

COMMITTEE CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Application for)	
Certification for)	Docket No.
The Ivanpah Solar Electric)	07-AFC-5
Generating System)	
_____)	

CALIFORNIA ENERGY COMMISSION

HEARING ROOM B

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

TUESDAY, AUGUST 24, 2010

10:11 A.M.

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James Boyd, Associate Member

HEARING OFFICER AND ADVISERS

Paul Kramer, Hearing Officer

Kristy Chew, Adviser

Tim Olson, Adviser

STAFF AND CONSULTANTS PRESENT

John Kessler, Project Manager

Caryn Holmes, Staff Counsel

Misa Milliron

Susan Sanders

Tom Hurshman

BLM

Scott Flint

Scott Cashen

Brian Croft

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CH2M HILL

Mark Cochran

Amy Hiss

INTERVENORS

Greg Suba
California Native Plant Society

Kevin Emmerich (telephonic)
Basin and Range Watch

Gloria Smith
Sierra Club

Bart Brizzee, (telephonic)
Peter Brierty (telephonic)
County of San Bernardino

Michael Connor (telephonic)
Western Watershed Project

Lisa Belenky
Ileene Anderson
Center for Biological Diversity

Debra Hughson (telephonic)
David Moore (telephonic)
Mojave National Preserve

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1 PROCEEDINGS

2 COMMISSIONER BYRON: We're on the record. Good
3 morning. I'm sorry for the late start. We had a little
4 technical problem.

5 This is Commissioner Jeff Byron, Presiding Member
6 of the Ivanpah Solar Electric Generating Station
7 Application for Certification.

8 With me is the Associate Member of this
9 Committee, Commissioner Boyd; and his advisor, Tim Olson.
10 To my right is my advisor, Kristen Chew.

11 The Hearing Officer is Mr. Paul Kramer.

12 And we are here in Sacramento to conduct a
13 Committee conference on this project. You all know that
14 on August 3rd we issued the Presiding Member's Proposed
15 Decision for the Ivanpah Solar Electric Generating System
16 Project. And we're here today to consider whether the
17 Commission should adopt, modify, or reject the PMPD and
18 errata.

19 We're certainly interested in comments from all
20 the parties, and we also invite the public to participate
21 this morning. The plan is to go until about the noon hour
22 and break for lunch and then go back at it this afternoon
23 as long as we need to make sure that we cover everybody's
24 concerns and interests.

25 I'd like to thank you all for being here this

1 morning. Thank you, Commissioner Boyd, for being here as
2 well.

3 I'm going to turn it over to our Hearing Officer
4 for introductions and get us started. Mr. Kramer.

5 HEARING OFFICER KRAMER: Okay. Thank you. Let's
6 begin with the applicant then.

7 MR. HARRIS: Good morning. This is Jeff Harris
8 on behalf of the applicant with Ellison, Schneider &
9 Harris.

10 With me from my office, Mr. Gregory Wheatland
11 sitting behind me; and the brains of our operation,
12 Ms. Samantha Pottenger, who's done all the hard work and
13 heavy lifting. Appreciate having her.

14 Steve de Young to my right is the Vice President
15 of Environmental Safety and Health. And then to his right
16 is Mr. Todd Stewart, who's the project manager.

17 There are also several other folks sitting back
18 here from CH2M HILL, our experts, who can introduce
19 themselves when they're called upon.

20 HEARING OFFICER KRAMER: And staff?

21 MS. HOLMES: Caryn Holmes, staff counsel.

22 The project manager, John Kessler, will be here
23 shortly.

24 And we have several staff members in the audience
25 who will be participating later, and they can introduce

1 themselves at that time.

2 HEARING OFFICER KRAMER: Thank you.

3 From the BLM? I see Mr. Tom Hurshman in the back
4 row who raised his hand. We'll recognize him. Anyone
5 else with you?

6 MR. HURSHMAN: I don't believe so.

7 HEARING OFFICER KRAMER: He says he doesn't
8 believe so.

9 Do we have anybody from the California Department
10 of Fish and Game?

11 CURE? Okay.

12 From the Western Watersheds Project?

13 DR. CONNOR: Mr. Kramer, this is Michael Connor.
14 I'm on the telephone.

15 HEARING OFFICER KRAMER: Okay. Great. We hear
16 you. Thanks.

17 Defenders of Wildlife?

18 Basin and Range Watch?

19 Let me check my list. They may announce
20 themselves later.

21 Somebody on the phone is shuffling papers and
22 we're hearing that. So if you can mute yourself, we'd
23 appreciate it.

24 The Center for Biological Diversity?

25 MS. BELENKY: Yes. This is Lisa Belenky with the

1 Center for Biological Diversity. And Ileene Anderson is
2 also attending today. And we'll be testifying.

3 HEARING OFFICER KRAMER: Okay. Sierra Club?

4 MS. SMITH: I'm not certain if there's anybody
5 from my organization on the phone or not. Scott Cashen is
6 available by phone today, our expert though.

7 HEARING OFFICER KRAMER: Okay. Thank you.

8 California Native Plant Society?

9 MR. SUBA: This is Greg Suba from California
10 Plant Society.

11 HEARING OFFICER KRAMER: And County of San
12 Bernardino?

13 MR. BRIZZEE: Yes, Bart Brizzee, Deputy County
14 Council for the county of San Bernardino. I believe Peter
15 Brierty from County Fire is also on the phone.

16 HEARING OFFICER KRAMER: Are you there Mr.
17 Brierty?

18 And then in the past we've had representatives
19 from the Nevada Department of Aviation. Is anyone from
20 that agency with us today?

21 MR. HALL: On the line is Charles Hall and Bart
22 Silverstein with the Clark County Department of Aviation.

23 HEARING OFFICER KRAMER: So how do you spell your
24 last names?

25 MR. HALL: Charles Hall, H-a-l-l. Mark

1 Silverstein, M-a-r-k S-i-l-v-e-r-s-t-e-i-n.

2 HEARING OFFICER KRAMER: Sorry. And the second
3 gentleman was?

4 MR. HALL: Mark Silverstein. It's Mark with a k.
5 Silver s-t-e-i-n.

6 HEARING OFFICER KRAMER: Okay. Thank you. I was
7 doing a few things at once.

8 Anyone from Southern California Edison, one of
9 our past visitors?

10 Okay. Is there anybody else in the room or on
11 the phone who wants to introduce themselves?

12 MS. HUGHSON: Debra Hughson with Mojave National
13 Preserve. I'm here with David Moore.

14 HEARING OFFICER KRAMER: Okay. Debra. Could you
15 spell both your names for us?

16 MS. HUGHSON: D-e-b-r-a, H-u-g-h-s-o-n.

17 MR. MOORE: And David Moore, M-o-o-r-e.

18 HEARING OFFICER KRAMER: That was the Mojave
19 National Preserve.

20 MS. HUGHSON: Correct.

21 HEARING OFFICER KRAMER: Anyone else wishing to
22 introduce themselves?

23 Okay. Well, let's go forward then.

24 The purpose of today's hearing is two-fold. We
25 have a comment period that's continuing to run for the

1 Presiding Member's Proposed Decision. And this is a forum
2 where especially members of the public can give us their
3 comments if they prefer to provide them orally rather than
4 submit them in writing. The time to submit those comments
5 though is extended until September 2nd.

6 But the reason we hold these conferences before
7 that deadline is -- well, of course, if we held it
8 afterwards, we would effectively extend the deadline and
9 that would be counterproductive. But it's a forum where
10 we try to get the applicant and the staff and any of the
11 parties who are interested in doing things like, for
12 instance, modifying conditions, to tell us about those by
13 this time so then we can discuss them and face to face.
14 It's a lot more efficient than trying to work out minor
15 changes to conditions by an exchange of documents.

16 And then in addition, for this particular case,
17 we noticed an evidentiary hearing. We wanted to have that
18 available to the parties if it was necessary for any
19 particular reason to provide additional evidence into our
20 record, to have a more complete record on which to base
21 our final decision.

22 So we will -- I suspect first what we'll need to
23 do is discuss what the parties wish to offer by way of
24 additional evidence and then discuss whether it's
25 appropriate for the Committee to take that or if it's

1 necessary. And then we will -- to the extent we decide
2 that evidence should come in, we will take that in
3 probably a somewhat free-form manner and then we'll take
4 public comment as well and discuss any particular issues
5 that any of the parties have with the conditions or any
6 other part of the decision.

7 I note that we've not received detailed comments
8 from the parties about the decision itself. So it may be
9 that we'll be in the mode of just relying on the final
10 filings. But we'll just have to see how that works out.

11 Do any of the parties wish to make some kind of
12 opening comments before we get rolling?

13 MS. HOLMES: Just scheduling comments. There's a
14 REAT team meeting this morning. And so staff was hoping
15 to check back in with folks at noon. And that may modify
16 or effect some of the comments that we have to make on
17 biological resources. So if it's not feasible to put over
18 biological resources until this afternoon, we'd like to at
19 least reserve the opportunity to revisit biological
20 resources after we've had a chance to look back with the
21 people who are attending the REAT meeting.

22 MS. SMITH: Mr. Kramer, Scott Cashen is attending
23 the Calico workshop this morning. And I spoke with him at
24 9:00. So unfortunately he's only available until 1:00,
25 unless I can figure out some way to pull him out of the

1 workshop.

2 HEARING OFFICER KRAMER: Mr. Harris.

3 MR. HARRIS: Mr. Kramer, a couple introductory
4 comments from the applicant.

5 First off, thank you for being here. It is a
6 really great day in a lot of ways, although we obviously
7 have some things we want to talk about. But it's an
8 important day and we appreciate your work getting out the
9 dock. It's a significant step forward.

10 In terms of what might be coming in today, yeah,
11 I do have a concern about the process and particularly new
12 evidence that might be coming in. The Commission has a
13 tradition of accepting additional evidence, for example,
14 from an air districts who files a document after your
15 record closes. That's pretty clearly the kind of things
16 you've done in the past at the PMPD hearings.

17 But in terms of accepting new evidence on topics
18 that are closed without a showing of good cause, to me,
19 that is a break with the precedent that the Commission
20 uses these PMPD hearings for.

21 I guess I'm particularly concerned about a lot of
22 documents that have been filed last minute. In
23 everybody's defense, there wasn't a specific filing
24 deadline. But at 9:15 this morning, Native Plant Society
25 files what they want to talk about today.

1 And, Greg, I'm not picking on you for that
2 reason.

3 MR. SUBA: That's the reality of it.

4 MR. HARRIS: There wasn't a deadline. Greg's not
5 late.

6 But we are somewhat concerned about what might
7 come in. There is a hearing record in the proceeding
8 which is the evidence taken and the transcripts. That's
9 different than reopening your record to accept public
10 comment, which is I think typically what we do at these
11 conferences. And so a lot of the documents that are
12 pre-filed here or written filed ahead of time here, 9:00
13 or earlier, are documents that go back several years.
14 They're not things that are new since the March 22nd
15 hearing. And there's no showing of why some of these
16 scientific papers, in particular, could not have been
17 pre-filed and discussed as part of the evidentiary record.
18 They pre-date the evidentiary record.

19 But having said all that, I think that you're
20 well within Commission tradition to accept those documents
21 as public comment. People can certainly attach them to --
22 they could attach them to their filings, which are due on
23 the 2nd. You could accept them now as public comment.

24 Our concern is really related to whether you put
25 on a witness who testifies subject to cross-examination

1 just like a particular evidentiary hearing on things that
2 haven't been pre-filed. I guess what we're going to be
3 hoping to do is everything come in. Everything that's
4 been filed ought to come in. Come into the record. It's
5 appropriate that it come into the record.

6 What we're going to start being a little
7 concerned is about witnesses and cross-examination and
8 those processes. And so I wanted to kind of set that up
9 as our concerns moving forward.

10 But I'm glad to answer any questions you have
11 about those. We have specific comments on various issues,
12 and I've got a lot of comments on SB 34, on the desert
13 tortoise relocation issued that's been raised, and we can
14 talk about those specific issues and how we can address
15 those when you get to each one of those. Thank you for
16 the opportunity to make those introductory remarks.

17 COMMISSIONER BYRON: Anyone else?

18 MS. BELENKY: This is Lisa Belenky with the
19 Center for Biological Diversity.

20 First of all, we appreciate you are having a
21 hearing today. And it is an evidentiary hearing as it was
22 noticed. All of this -- I don't know if this is the
23 proper time to argue about the admissibility of the
24 evidence and whether we should take testimony. But from
25 the Center's point of view, the final EIS and documents

1 submitted by staff to all of the parties show that there
2 have been significant changes particularly in the
3 translocation plan and that many of the impacts of those
4 changes were not actually before the Commission and have
5 never been reviewed in an evidentiary hearing. And those
6 are all of the information that the Center submitted for
7 this evidentiary hearing. Goes to those new issues that
8 have not been fully vetted in an evidentiary hearing. And
9 we believe they should be accepted and we should be
10 allowed to have testimony on this question.

11 HEARING OFFICER KRAMER: Could you be a little
12 more specific about -- are you talking about issues beyond
13 the tortoise or just basically related to the tortoise?

14 MS. BELENKY: Primarily relating to the
15 translocation plan relating to the tortoise which has
16 changed significantly since the hearing that we had back
17 in March -- is that when we were here? Yes. Primarily.

18 HEARING OFFICER KRAMER: The Committee is aware
19 for no other reason than some of the members' exposure in
20 other cases that there has been some new information that
21 has come out about the continuing studies of the Fort
22 Irwin projects. And I think we are interested in trying
23 to see that all of our cases are decided upon basically
24 the same outside evidence, and evidence that's not project
25 specific with regard to that. So we are interested in

1 hearing comments from the parties and their thoughts about
2 how the news from the Fort Irwin studies applies to this
3 particular project.

4 If you were -- Mr. Harris does make a good point,
5 though, that if you're bringing up a study, for instance,
6 on a topic like noise and something that's been around
7 since before the hearings were originally conducted, that
8 it doesn't seem appropriate to reopen those topics which
9 are not the kind of moving target that the tortoise seems
10 to be.

11 MS. BELENKY: Thank you.

12 I'm just speaking for the Center for Biological
13 Diversity and all of the evidence and the testimony we'll
14 be presenting deals with the changes to the proposal, and
15 particularly the changes with the translocation plan which
16 was originally conceived as a short-distance translocation
17 within the valley and is now being discussed as a
18 long-distance translocation into the Mojave National
19 Preserve.

20 And we are particularly concerned that many of
21 those impacts that would result from that, both to the
22 tortoise on the site and tortoises on other sites,
23 particularly where they will be translocated within the
24 Mojave National Preserve have not been analyzed under CEQA
25 before this body. And all of our evidence goes to those

1 questions. And I do think that evidence needs to be
2 provided and not just public comment on those questions.

3 HEARING OFFICER KRAMER: Okay. Let me ask the
4 staff: Is the translocation plan -- is it still in flux,
5 or has it been pretty much nailed down, to use a technical
6 term?

7 MS. HOLMES: I'd like to start off by saying
8 there have been very minimal changes to the Conditions of
9 Certification that staff has proposed with respect to the
10 translocation plan. So I think it's important to separate
11 out the translocation plan itself and the Conditions of
12 Certification that staff has been recommending that the
13 Commission adopt.

14 The only change that's been recommended to the
15 Condition of Certification has to do with the review
16 process. And I apologize; we had hoped to be able to file
17 our proposed changes to the Conditions of Certification
18 before the hearing. We obviously haven't done that. You
19 haven't seen it, but we're happy to walk through them.

20 With respect to the status of the translocation
21 plans itself, I think John looks like he wants to say
22 something.

23 MR. KESSLER: Our understanding is that there are
24 two options right now. The original plan to move the
25 tortoise westward is to the Mojave Preserve. And the

1 wildlife agencies are still exploring some details to
2 determine which is the best option.

3 The position of the agency is that there's
4 adequate guidelines in place that either of those could be
5 viable and ensure that the tortoises are adequately
6 protected in the course of the relocation/translocation.

7 We were hoping to be in a position today where we
8 could be more certain about some of those options that
9 would be pursued, but that just wasn't possible. So we're
10 giving you the latest update that we can at this point in
11 time. If you want to get into more details about what
12 some of those considerations are, then I think we have
13 some people on board today as well as the afternoon to
14 more fully discuss that.

15 MR. HARRIS: Mr. Kramer, on this issue, a couple
16 things I'd like to say.

17 First, I want to be very clear I don't have any
18 problem with all this information coming in today as
19 public comment. So if Ms. Allen -- I'm sorry --
20 Anderson -- I'm sorry -- wants to provide public comment
21 in the form of what she's filed, then I don't have a
22 problem with that. I don't have a problem with the
23 studies that may be 80s or 90s studies coming in as public
24 comment. It should all come in as public comment though.

25 I guess I want to remind folks the biological

1 opinion is a federal decision. So as a matter of law,
2 there is no decision this Commission makes on the
3 biological opinion, and that translocation plan is part of
4 that federal process. And the Commission's traditional
5 precedent -- I want to remind you of your precedent --
6 which is that you recognize that document is federal. You
7 have approved -- completely approved, certified, final,
8 not appealable Supreme Court and appealed without a
9 biological opinion in hand. And you've done that as a
10 matter of law and done it legally, because that opinion is
11 a federal decision. It's not a decision this Commission
12 needs to make. So that's the history of the Commission
13 working on the biological opinion.

14 That doesn't mean there is a gap in the record,
15 and it doesn't mean there is a gap in the decision. You
16 have condition Bio 9 which is the translocation plan which
17 says, among other things, that "the project owner shall
18 develop and implement a final desert tortoise relocation
19 plan that is consistent with the current approved U.S.
20 Fish and Wildlife guidelines and the approval of BLM, the
21 Service, CDFG, and the Commission staff." And it goes on.

22 So as a matter of law, you have no decision to
23 make on the relocation plan. You can't make a decision on
24 the relocation plans that binds the federal government.

25 Having said that, if they want to present to you

1 as a Commission, the decision makers, their argument of
2 public comments, we have no objection to that at all.

3 MS. SMITH: Mr. Kramer, I don't need to remind
4 you or any of the staff the Commission has an obligation
5 to fully mitigate all impacts to the desert tortoise. And
6 the translocation has become a moving target.

7 As a result of a FOIA request, we just received a
8 lot of information updating the results of the Fort Irwin
9 study. That's why this information is coming to light.
10 We submitted a FOIA request and received responses.
11 That's why we're presenting this information now, and
12 that's why we believe it should come in as testimony. And
13 Mr. Cashen will sponsor these exhibits as a result of the
14 FOIA request. This is not old, stale information, again
15 as you know. You've learned in other proceedings.

16 And it's also coming to light that translocation
17 is much more fraught with uncertainty than was originally
18 understood. And that is something that should be in the
19 record and before the Commission for this proceeding. And
20 I don't think it's quite so simple to either decide we can
21 either move them westward or move the desert tortoise to
22 the Mojave Preserve. Six to one, half-dozen the other.
23 Doesn't matter. I think we understand that's clearly not
24 the case.

25 MR. HARRIS: If that evidence comes in -- I

1 understand you're saying it's the result of a FOIA
2 request. I would like an offer of proof as to why it
3 couldn't have been presented in the prior hearings.

4 MS. BELENKY: This is Lisa Belenky with the
5 Center for Biological Diversity.

6 I think we're mixing a couple of things together
7 here. So let's pull them apart a bit.

8 This Commission does have a requirement that they
9 fulfill their duties under CEQA, and they must fulfill
10 their duties under CESA as well if they're going to issue
11 an inland permit for the taking of the tortoise under
12 California law.

13 These issues regarding a change in the
14 translocation plan directly impact both of those
15 questions. This is not what was ever before the
16 Commission before when we were having our hearings at that
17 time. A short distance translocation into the same valley
18 was all that was discussed. There was never a long
19 distance translocation discussed. All of the evidence
20 that at least the Center is providing goes to that
21 question of these changes in the translocation plan. And
22 we wouldn't have provided them at the earlier hearings,
23 because those hearings were not about a long distance
24 translocation plan. They assumed a short distance
25 translocation plan. So some of that evidence is not new

1 in the sense it could not have been brought before forward
2 because it simply -- the issue was not forward in this
3 hearing.

4 Secondly, there is some information that has been
5 gleaned through the FOIA and from both Fish and Wildlife
6 and USGA that came in after our hearings. And some of the
7 evidence is in that category. And it may go to either
8 short or long distance translocation.

9 HEARING OFFICER KRAMER: Okay. Well, anything
10 more on what we might want to talk about with regard to
11 the biology topic?

12 MS. HOLMES: Staff is prepared to talk about
13 proposed changes to an addition to Bio 9, which we just
14 discussed. Bio 17, Bio 18, and I don't know the
15 Conditions of Certification that involves the raven
16 management plan, 12.

17 And then there's also -- staff would like to
18 discuss the possibility of having a new Condition of
19 Certification relating to bat and avian monitoring. Those
20 are all issues that we can walk through to a certain
21 extent. Some of the discussion may be more complete if we
22 can do that in the afternoon when the wildlife agencies
23 can participate in the discussion.

24 HEARING OFFICER KRAMER: As far as availability
25 goes, Mr. Cashen is not available this afternoon. Is

1 anyone else unavailable this afternoon?

2 MR. HARRIS: Mr. Kramer, I'll check with my
3 tortoise experts who have flown in today and see if they
4 have airplane issues. I'll let you know as soon as we do
5 that.

6 MS. BELENKY: And some of us do have a meeting at
7 2:00. But, I mean, if we're in evidentiary hearing, we'll
8 stay here. But we would prefer to be able to make that
9 meeting. It's also in Sacramento probably 20 minutes
10 away. And it's from 2:00 to 4:00, so we can come back and
11 continue after, as the Commission loves to go late into
12 the night.

13 MS. HOLMES: I believe we lose one of the
14 wildlife agency representatives at 4:00. I can't remember
15 which one.

16 HEARING OFFICER KRAMER: I think we'll have to go
17 forward through that meeting if we cannot finish before
18 that. So we have -- so that's the bio issues.

19 Ms. Holmes, was that 9, 12, 18 and 19?

20 MS. HOLMES: Nine, 12, 17, there is a minor
21 change to 18 having to do with the misidentification of
22 one of the plants, and discussion about a proposed new
23 condition, which would be Bio 21.

24 HEARING OFFICER KRAMER: And 19? I thought you
25 said 19.

1 MS. HOLMES: 18. I probably said 19 because in
2 most other places the rare plant condition was 19. I
3 apologize.

4 HEARING OFFICER KRAMER: That's okay.

5 MS. HOLMES: And we have other areas as well.

6 HEARING OFFICER KRAMER: And then we have the
7 changes -- Mr. Suba.

8 MR. SUBA: I just wanted to second the discussion
9 on Bio 18. I had some questions on Bio 18 as well.

10 HEARING OFFICER KRAMER: Okay.

11 MR. HARRIS: Mr. Kramer, I checked with my
12 tortoise folks, and we have until about 4:00 with them
13 today.

14 HEARING OFFICER KRAMER: Okay. Thank you.

15 Then we also had I think what I would
16 characterize as a minor cleanup issue in just the changes
17 that staff propose to the air quality conditions at the
18 end of April I believe. Does anybody have any objections
19 to those changes?

20 MR. HARRIS: Mr. Kramer, we may want to talk
21 about some of the bio conditions as well, especially the
22 funding Number 17. That's on your list.

23 HEARING OFFICER KRAMER: 17 was air quality.

24 MR. HARRIS: I'd actually like to see if we could
25 get the FDOC -- the revised FDOC into the record so I can

1 release Mr. Hill, who's here on our behalf. I think
2 that's the only air issue is just the Commission accepting
3 that document. We've got copies of it available.

4 HEARING OFFICER KRAMER: Okay. Is anybody going
5 to object to the acceptance into evidence of the latest
6 FDOC? Do you have a date?

7 MR. HARRIS: We got 20 copies actually.

8 HEARING OFFICER KRAMER: And will anyone have any
9 questions for Mr. Hill from the air district about that?

10 MR. HARRIS: April 16, I'm told. And Mr. Hill is
11 with the applicant.

12 HEARING OFFICER KRAMER: April 15.

13 Did you pick an exhibit number for that one?

14 MR. HARRIS: We're bringing around copies. This
15 is Revision C to the FDOC.

16 HEARING OFFICER KRAMER: Looks to me like the
17 next number would be 90.

18 MR. HARRIS: Typically, the staff sponsors this
19 in, but we brought copies. That's fine with us as long as
20 it gets in. Either way.

21 HEARING OFFICER KRAMER: So hearing no objection,
22 Exhibit 90 is in. Final determination --

23 MS. BELENKY: We didn't even get a copy. I think
24 you sent this by e-mail, didn't you, before or --

25 MR. HARRIS: I think the district filed this

1 electronically. It's been on the web sites for quite a
2 while.

3 MS. BELENKY: But it wasn't sent to all the
4 parties.

5 MR. HARRIS: I believe it was filed and served.
6 This is the air district's document. It's not our
7 document. I want to be clear about that as well.

8 COMMISSIONER BYRON: This document is dated April
9 13th, 2010, is this the final document.

10 MR. HARRIS: Revision C to the FDOC. And it's
11 the final action by the air district on the project.
12 Essentially what it does is reflects the M3, mitigated
13 three configuration, the smaller footprint. Even though
14 the impacts are less for the project, the smaller project,
15 you still have to go back and essentially run all the
16 traps to show that. That's what the district did with
17 Revision C.

18 HEARING OFFICER KRAMER: Any objections?

19 Seeing none, that will be received into evidence.

20 (Thereupon, the above-referenced document was
21 received into evidence by the Hearing Officer.)

22 MR. HARRIS: Are we done with air quality then?
23 Can I release Mr. Hill?

24 HEARING OFFICER KRAMER: Does anybody have any
25 air quality questions? Staff's going to be proposing new

1 air quality amendments. Besides those that we're
2 circulated at the --

3 MR. KESSLER: Just those that we related to the
4 amendment.

5 HEARING OFFICER KRAMER: Doesn't sound as if
6 there will be any air quality questions.

7 The applicant did -- the applicant did provide
8 me, and I don't think he provided the other parties here,
9 the list of conditions that you thought the PMPD had not
10 properly picked up the latest versions of. I'm trying to
11 find that to see if there are any air quality issues
12 related to that.

13 MS. BELENKY: Is that document going to be
14 circulated?

15 HEARING OFFICER KRAMER: Sorry?

16 MR. HARRIS: That document we only saw one date
17 for filing of that paper, so we intended to file that as
18 part of the September 2nd file. So it hasn't been filed
19 yet, no. So Greg is not late, and I'm really not late.

20 MS. BELENKY: If we're going to discuss the terms
21 of it at this hearing, it would be helpful if you could at
22 least provide us with a copy. But fine. We can just
23 orally go through it and read it out or something. I
24 don't see how else everyone can participate.

25 MR. HARRIS: As I said earlier, Ms. Pottenger is

1 running the show. She has 20 copies of that. These are
2 conditions where we believe there were simply cut and
3 paste errors in the PMPD. And there was a 3/29 version
4 staff compilation, your greatest hits of conditions. And
5 instead of using that 3/29 version, the PMPD in several
6 instances use the final staff assessment version, earlier
7 version.

8 COMMISSIONER BYRON: When you say 3/29, you mean
9 March 29?

10 MR. HARRIS: Correct. I can only keep a number
11 or date in my head in that way, which we believe at least
12 in joint -- with staff that's our joint recommendation to
13 the Committee and they were reflected there.

14 MS. HOLMES: I think these are AQSC 5 and AQSC 6.

15 MR. HARRIS: In terms of air quality ones,
16 correct.

17 HEARING OFFICER KRAMER: And Condition 5 was
18 about the diesel fuel engine controls.

19 MS. HOLMES: Correct.

20 HEARING OFFICER KRAMER: And 6 was about having
21 off-road vehicles the applicant might use to meet
22 California on-road emission standards.

23 MS. HOLMES: Staff also had a couple of
24 additional changes to AQSC 7, not substantive. But we can
25 file those with comments just to be sure, consistency. I

1 don't think they are the subject to the hearing.

2 HEARING OFFICER KRAMER: I'm just pausing here to
3 see what my master control -- if I can figure out who's
4 making that background noise and mute them.

5 Folks, if you are going to have background noise
6 in your vicinity, if you can mute yourself, that would be
7 a big help. Because otherwise we'll have to do it at some
8 point. And then we may not be able to hear you when you
9 do want to speak. So police yourself if you can.

10 So we've dealt with air quality. Are there any
11 other topic areas that a party wishes to identify where we
12 need to have some discussion today?

13 MR. BRIZZEE: This is Mark Brizzee from the
14 County of San Bernardino. We submitted with our comments
15 the study from Stan Hoffman which we asked to be
16 identified as Exhibit 1102.

17 MR. HARRIS: Again, we won't have any objection
18 to that coming in as public comment. But as a separate
19 exhibit, there's no witness sponsoring that testimony. So
20 I think it's appropriate it comes in as public comment.

21 MR. BRIZZEE: We have Mr. Hoffman I believe
22 available and Mr. Brierty to testify.

23 HEARING OFFICER KRAMER: Let me ask you: This,
24 of course, relates to the county's desire to have
25 compensation for -- to receive some funds to be able to

1 improve its fire service for the project. Have you and
2 the applicant reached some kind of agreement about that?
3 Or is that something that you're asking that the Committee
4 adjudicate?

5 MR. BRIZZEE: I know there have been ongoing
6 discussions between representatives from the county and
7 also representatives of the applicant. Those have been
8 without the involvement of counsel I believe on either
9 side. And my understanding is that they have been
10 favorable and positive, and there have been some forward
11 progress made on working out the details of that.

12 Unfortunately, parties couldn't wrap those up
13 before this hearing. And as an exercise of caution, we
14 submitted this.

15 I will tell the Commission and the applicant that
16 we are still workable and we still want to continue those
17 discussions and hopefully reach agreement.

18 With all due respect to the Commission, we think
19 we can come up with a better solution together than
20 perhaps can be dictated by the Commission on these topics.
21 So that's where we're at.

22 MR. HARRIS: If I could just add to that.

23 I think Bart is properly characterizing things.
24 We're having very good productive discussions with the
25 county. These are ongoing. This is a little bit of the

1 lawyers making sure they're protecting their clients.
2 What I mean by that specifically is that agreement is not
3 final. So we understand and appreciate the county's need
4 to place a marker, if you will, given that the hearing is
5 not final. And they put their positions out there. We
6 obviously have some disagreement with the way things are
7 characterized in the county's filing. To the extent
8 there's -- I guess, for instance, most of the county's
9 filing in my mind covers things that have already been
10 covered by your staff. So there's nothing really new in
11 the county's filing.

12 Now this is me making my record, by the way.

13 I don't believe there's anything new in the
14 county's filing. To the extent there is anything new,
15 there's no showing of good cause that would be taken into
16 consideration at this point. The county has been a party
17 in this proceeding and had an opportunity to present
18 witnesses that did not -- had an opportunity to
19 cross-examine witnesses and as I recall either did not or
20 very limited cross-examination. So I guess I want to be
21 on the record as suggesting that there's nothing new. To
22 the extent there's anything new, it shouldn't go forward.

23 I also have very clear direction from my client
24 not to do anything stupid or say anything stupid. I think
25 we have an agreement and understanding with the county

1 that we quickly memorialized. Mr. Stewart has done a
2 yeoman's job on the negotiations, I think feels very good
3 about them. And we feel like we're doing a very good
4 thing with the county.

5 So having made my record, let me say that I think
6 we're very close to being done and everybody being happy.

7 HEARING OFFICER KRAMER: When would you be done?
8 Before the end of the comment period?

9 MR. HARRIS: Todd is going to try like heck.
10 I'll let him answer that.

11 MR. STEWART: We currently don't have a specific
12 date when we're going to finish. However, meetings
13 that -- we have already had the first one with the county
14 administrative office, and the second one sitting down
15 with Fire Martial Brierty and Fire Chief Dan Wurl was very
16 productive. And we identified specific agreements on
17 capital costs and timing of payments and things like that.

18 We are currently working through the O&M phase of
19 what the county is recommending. We've studied the
20 Hoffman report and made some recommendations to the fire
21 department as to maybe some adjustments that need to be
22 made and updates for acreage and megawatt levels, things
23 like that. And the fire department has agreed to make
24 those adjustments which are going to adjust the payments.
25 So we expect within the next several weeks we will have a

1 conclusion of this agreement. And the county filing I
2 think is --

3 HEARING OFFICER KRAMER: Are you trying to speak
4 to the hearing room?

5 MR. BRIZZEE: I believe that's Stan Hoffman
6 calling in.

7 MR. HOFFMAN: This is Stan. I just connected.

8 HEARING OFFICER KRAMER: We're in the middle of a
9 discussion.

10 MR. STEWART: I feel between Fire Martial Brierty
11 and Chief Wurl and the applicant's team, I think we will
12 come to an agreement within the next several weeks that
13 meets the needs of both parties, without the additional
14 help of the Energy Commission.

15 HEARING OFFICER KRAMER: I think we'd be happy if
16 you can do that. And if you -- is it fair to say you'll
17 report in your final comments where that stands?

18 MR. STEWART: Absolutely.

19 HEARING OFFICER KRAMER: Mr. Brizzee.

20 MR. BRIZZEE: Yes. In fact, I believe Chief
21 Brierty is on the phone also, and we can confirm the
22 status of those talks.

23 MR. BRIERTY: This is Chief Brierty.

24 The characterization that was just provided is
25 exactly correct. Our meetings with the proponent have

1 been very successful, probably the most successful
2 conversations we've had in this process with several other
3 proponents. And we have exchanged potential wording for
4 potential agreements and contracts. And it's very, very
5 successful. And I don't see any reason why it wouldn't
6 culminate in success for both parties.

7 HEARING OFFICER KRAMER: In the next few weeks?

8 MR. BRIERTY: Yes. We're working on it on a
9 daily basis.

10 HEARING OFFICER KRAMER: Okay. Great.

11 MR. BRIZZEE: It's the county's intent to provide
12 an agreement with the proponent as opposed to having to
13 deal with the third-party consultant.

14 HEARING OFFICER KRAMER: Mr. Brizzee, was that --
15 1102 was the exhibit number?

16 MR. BRIZZEE: Yeah. Yes.

17 HEARING OFFICER KRAMER: Given that -- whether or
18 not the report was available at the time, certainly the
19 concepts are not new. Development fees have been around
20 for quite a while and impact fees. So --

21 MR. BRIZZEE: May I speak to that?

22 HEARING OFFICER KRAMER: Go ahead.

23 MR. BRIZZEE: It's difficult for the county not
24 to look at the three primary projects that are currently
25 in process: The Calico, the Abengoa, and the Ivanpah as

1 somewhat related. Obviously, they're in the same general
2 area and could be subject to the same emergency
3 conditions. And we believe that the treatment that is
4 accorded them should be consistent I think as you alluded
5 to earlier in your comments. And also that this has been
6 somewhat of a process -- an organic process even with
7 staff working through these concepts, because Ivanpah
8 stands out as being treated somewhat differently than the
9 Abengoa and the Calico project.

10 Also, the Hoffman report is dated after the last
11 hearing in this matter. So we made that qualification.

12 But again, I understand the dilemma that
13 obviously it would be better for the parties to work this
14 out than to -- and I think of -- I think Chief Brierty has
15 well articulated the county's position in that and we seem
16 to be on board with that.

17 But at the end of the day, until the ink is on
18 the paper, there is no agreement. And we simply want to
19 make sure that we reach that before the conclusion of
20 these proceedings.

21 HEARING OFFICER KRAMER: Well, I think if the
22 Hoffman report came in as evidence, then the applicant's
23 going to want to spend some time refuting it, no doubt.

24 Am I correct, Mr. Harris?

25 MR. HARRIS: Yes. We'd want that opportunity if

1 it came in as evidence. We have no problem coming in as
2 public comment.

3 HEARING OFFICER KRAMER: And one of the solutions
4 that has been worked out in another case is the condition
5 in the Abengoa case. Just by way of comment, Mr. Brizzee
6 and then Mr. Harris, are you aware of -- I'm sure you are,
7 Mr. Brizzee -- I don't know about Mr. Harris. Are you
8 aware -- what are your thoughts about that basic
9 formulation?

10 MR. HARRIS: Mr. Brizzee, you want to go first?

11 MR. BRIZZEE: Sure. Thank you.

12 Actually, I submitted the two versions of that,
13 the Abengoa Worker Safety 7 and Worker Safety 8, as
14 proposals for this case. The two being -- the one that
15 was based on staff's recommendation and the other one
16 being the one that was based on the Abengoa PMPD for
17 consideration by the Commission.

18 HEARING OFFICER KRAMER: Mr. Harris.

19 MR. HARRIS: Yeah, I'm aware of the condition.
20 Mr. Wheatland actually was involved in that hearing of
21 Abengoa. So we're well aware of the Commission. We're
22 satisfied with the Committee's version of that condition,
23 not the staff's. No disrespect, staff.

24 And the reason for that is that the Committee's
25 version says basically Worker Safety 6 and 7 in Abengoa,

1 you'll work this out. If you can't work it out, it ends
2 up at CPM. The staff version says \$24 million. Go work
3 it out. If you don't work it out, it's \$24 million.
4 Don't sound like a negotiation. I wouldn't advise my
5 client under those circumstances.

6 The Committee version of that Abengoa condition
7 would be acceptable. If we can get agreement in principle
8 for the second or so -- it seems unnecessary, but we
9 wouldn't object to the Committee version of Abengoa.

10 HEARING OFFICER KRAMER: Maybe that's the
11 solution to this conundrum then.

12 MR. BRIERTY: If I may, this is Chief Brierty.

13 The characterization of this being similar to
14 Abengoa, I think we need to state clearly that it is very
15 much the opposite. Instead of refuting the Hoffman report
16 or discussions that have been -- that the logic used in
17 the Hoffman report has been acceptable, it's just in terms
18 of specific values that were used that we're actually
19 discussing with Ivanpah to modify them. And so to
20 characterize this as similar to the Abengoa discussions
21 where they refused to talk to us about it is distinctly
22 different in the case of Mr. Stewart and Ivanpah where we
23 have a very, very good conversation going on with regard
24 to the Hoffman report, how it was created, logic behind
25 it.

1 And I think we're moving to a very, very
2 successful resolution to this using the Hoffman report,
3 just modifying it slightly, as opposed to refuting it. So
4 I think it's important to note dramatically different in
5 Abengoa in terms of our discussion with the proponent in
6 this case.

7 HEARING OFFICER KRAMER: Well, we're simply
8 speculating at this point. But we've heard your comments
9 about both parties who are most involved with the merits
10 of that approach.

11 Does any other party want to weigh in on this
12 fire or worker safety fire protection issue? Staff?

13 MS. HOLMES: Staff has a preference for having a
14 condition that has some kind of a dollar amount in it as a
15 fall back. We are concerned about the fact that there is
16 a body of case law that indicates -- that says go off and
17 perform a study and then do whatever the study says is
18 insufficient mitigation.

19 So we think by including a dollar amount in the
20 Condition of Certification the Commission avoids some of
21 that potential liability. And that's reflected in the
22 Conditions of Certification staff proposed for the Calico
23 and Imperial cases.

24 HEARING OFFICER KRAMER: Now if parties were to
25 reach an agreement, would that satisfy your concerns?

1 MS. HOLMES: Yes. I think it's probably more
2 than substantial evidence that there will be adequate fire
3 protection if the fire department comes back and tells us
4 they are happy.

5 HEARING OFFICER KRAMER: I would imagine that
6 would be one of the first recitals in the agreement in
7 fact.

8 Okay.

9 COMMISSIONER BOYD: If I might comment. I don't
10 know how wise this is to comment. But you've got two
11 Commissioners here who -- I sit on Abengoa. I'm very
12 familiar with this issue. Mr. Byron sits on Calico and is
13 very familiar with that iteration. And here we sit
14 together in the third leg of the stool and the edge of the
15 triangle.

16 So I'm relying heavily on the early testimony
17 that said that two groups are working together very
18 positively and cooperatively to reach resolution. I'm
19 even impressed with a statement made that this is the best
20 negotiations. Maybe that meant of the three that are
21 going on. So I'm relying heavily on that commitment and
22 not real inclined to do anything just yet with regard to
23 any club, levers, or a gun to anyone's head. We save that
24 for if you can't resolve it.

25 So Commissioner Byron, you're presiding here, and

1 that's just kind of my views of where we stand. But
2 having participated at length in the Abengoa situation
3 which seemed to precipitate this whole discussion of the
4 new study, fairly late-breaking study with regard to
5 Abengoa, I think we've heard the best we can hear today.
6 And I wish all the parties well and hope they do resolve
7 it.

8 COMMISSIONER BYRON: Mr. Boyd, thank you for
9 adding your comments. That's very helpful.

10 HEARING OFFICER KRAMER: Okay. So anyone else on
11 the worker safety? Then, Mr. Brizzee, we will accept the
12 Hoffman report Exhibit 1102 as public comment.

13 (Thereupon the above-referenced document was
14 received into evidence by the Hearing Officer.)

15 MR. HARRIS: I just want to clarify one thing.

16 We looked at the Abengoa conditions, and the ones
17 that we're talking about are Abengoa 6, Abengoa 7, but not
18 Abengoa 8. Okay. Eight as proposed by the county. So
19 it's 6 and 7 from the Abengoa PMPD is what we're focused
20 on.

21 HEARING OFFICER KRAMER: And what's the subject
22 of that Abengoa 8?

23 MR. DE YOUNG: Worker Safety 8 and this
24 proceeding.

25 HEARING OFFICER KRAMER: Oh, I see. So it would

1 be 6 and 7 from Abengoa in lieu of 7 and 8. I got you.

2 MR. DE YOUNG: We have a problem with 8.

3 MR. BRIZZEE: I re-numbered the Abengoa
4 conditions to be consistent with the Ivanpah worker safety
5 conditions. So that's why they don't jive. But I think
6 it's the same two conditions we're talking about.

7 MR. STEWART: The condition that we have and the
8 issue is with the one that requires us to place a bond
9 with the county of over a million dollars prior to any
10 construction. So that's the one.

11 Being as we are, as Fire Martial Brierty has so
12 kindly stated -- and he and Mr. Wurl have been terrific to
13 work with as well. We've already targeted specific
14 payment dates for certain aspects of the developer impact
15 fees, which are completely different than what is
16 contemplated in the bond amount under Worker Safety 8.
17 And I don't believe that that condition is appropriate at
18 this point, nor is it required.

19 MR. BRIZZEE: Bart Brizzee again.

20 Your contention is it shouldn't be a million
21 dollars, but under the PMPD under Abengoa version that's
22 reduced to 200,000. Is that the distinction you're
23 drawing?

24 MR. STEWART: The distinction is that it should
25 be zero based on the positive negotiations and work that

1 BrightSource and County Fire have already accomplished in
2 assessing when certain payments should be accomplished.

3 MR. BRIZZEE: And I agree if a settlement of this
4 can be worked out, obviously those are going to be key
5 terms, the payment amounts and dates and so forth.

6 I guess my question is to the Commission Hearing
7 Officer Kramer, and that is where do we go from here then
8 as far as the condition and the negotiations of the
9 parties?

10 HEARING OFFICER KRAMER: Well, try to work out a
11 deal and report it back to us. If you do, then my sense
12 is that the Commission would endorse that. There's always
13 the possibility that you'll come to some deal that's
14 unpalatable, but I think it's remote.

15 MR. BRIZZEE: And then again, worst-case
16 scenarios if the parties are not able to agree, then the
17 Commission would impose some version of the Abengoa
18 conditions.

19 HEARING OFFICER KRAMER: At this point, it's not
20 clear. But we have received your comments about that, and
21 we will take that into consideration.

22 MR. BRIZZEE: And I believe Mr. Harris said he
23 would stipulate to the second Abengoa condition coming in.

24 HEARING OFFICER KRAMER: By second, you mean the
25 version in the PMPD?

1 MR. BRIZZEE: That's correct.

2 MR. HARRIS: Yeah, I'm going to ask Mr. de Young
3 to clarify.

4 The condition we're talking about here, whether 7
5 or 8 depending on the numbering, is one that requires the
6 project owner to pay for the transaction costs of the
7 county.

8 MR. DE YOUNG: I think the issue here between the
9 Calico project, Abengoa project, and the Ivanpah project
10 is that the hazards associated with Calico as a sterling
11 technology and Abengoa as a tough technology are
12 completely different than the hazards that are associated
13 with the Ivanpah technology.

14 HEARING OFFICER KRAMER: Meaning that your
15 transfer fluid is inflammable. Tends to put out fires.

16 MR. DE YOUNG: The potential hazards are much,
17 much, much less.

18 MR. HARRIS: To be very specific, the sterling
19 engines have hydrogen, which as you remember the
20 Hindenberg. They also have a fluid -- a transfer fluid
21 that in this case we don't have a transfer fluid. We
22 directly blow water. So our water is not flammable or
23 toxic. So there are pretty big distinctions in the
24 hazards.

25 HEARING OFFICER KRAMER: In my mind, that relates

1 more to the risk of the project than whether you're paying
2 the transaction costs, which I assume are things like air
3 fees.

4 Am I not understanding your point?

5 MR. STEWART: The Hoffman report, which Mr.
6 Brizzee and Mr. Brierty have both referred to, in its most
7 recent form and per additional adjustments that we expect
8 to be implemented on the report based on e-mail
9 communications between the fire marital and myself
10 recognizes the difference in the level of hazards between
11 Calico, Abengoa, and Ivanpah and gives us credit for the
12 fact that our operating fluid is not flammable. So that
13 was some of the discussions that we've had.

14 And we haven't challenged the county on its
15 methodology. I mean, certainly someone could. They could
16 recommend a different type of methodology. Our position
17 is that one methodology has good points and bad points and
18 another is going to have good points and bad points as
19 well.

20 The point now is that in these advanced stages of
21 the negotiations, we feel that it's detrimental to our
22 further continued work if we are told that, well, we don't
23 trust what's going on and we're going to put a club over
24 your head. And we want you to put in X hundreds of
25 thousands of dollars to make sure that you come to an

1 agreement.

2 And fire martial and fire chief and you, we are
3 close. And we are working in a very productive and
4 positive way, and I don't believe it's necessary. I think
5 the Commission should recognize the fact that we are
6 working in a positive and productive fashion.

7 HEARING OFFICER KRAMER: Well, my question is a
8 little different. Mr. de Young was talking about -- I
9 don't have the condition in front of me, which is
10 handicapping me a little bit -- about a requirement that
11 the applicant would pay the transaction costs of the
12 county and entering into the agreement. In my mind, that
13 means their attorneys fees, maybe some expert costs. And
14 I just didn't see the connection between that and the
15 relative safety of the different facilities.

16 MR. HARRIS: Well -- and maybe there's not a good
17 direct connection there. But I actually don't think you
18 should be in the business of dictating commercial terms
19 between two people who are trying to work these issues
20 out. I think it's bad precedent for the Commission to
21 tell applicants they're going to pay the transaction costs
22 of parties.

23 Now, there is a process in your regulations that
24 allows for recovery of costs for certain reviews. But the
25 idea that a negotiation -- a commercial negotiation then

1 becomes the subject of the Condition of Certification. To
2 me, that's not what you ought to be doing. I think there
3 is some relationship between the two. If it's a simpler
4 technology, the analysis of the impact is easier.

5 But setting that aside, I think it's really bad
6 form for the Commission to dictate commercial terms among
7 parties trying to negotiate a deal.

8 MS. BELENKY: I just am confused. I thought that
9 this was between you and the county and the county fire
10 department, but you're not a private commercial entity.
11 They're public entities and the county is, in fact, part
12 of the State of California.

13 MR. HARRIS: You are correct. I will stipulate
14 that the county is part of the State of California. We're
15 a private entity. And imposing on the applicant who's the
16 only party who can have on them a requirement to pay
17 somebody's legal bills is something you ought not be
18 doing.

19 These issues will be dealt with, or not, in the
20 agreement with Mr. Stewart is working on. And this is not
21 the kind of thing this Commission needs to decide in the
22 case, nor is it precedent for any of these commercial
23 negotiations.

24 HEARING OFFICER KRAMER: Well --

25 MS. BELENKY: It's not a commercial negotiation.

1 MR. HARRIS: We are a commercial entity. It is a
2 negotiation outside of CEQA for the application process.
3 I recognize the county is a public entity. And I'll
4 stipulate to that. But --

5 MS. BELENKY: Thank you.

6 MR. HARRIS: Lisa and I are in agreement now.

7 HEARING OFFICER KRAMER: We note that we are I
8 think simply trying to figure out what we need to know in
9 order to deal with the potential situation where there is
10 no agreement at the time that the Commission must issue a
11 final decision. So that's why we've been asking these
12 questions. But as we said at the start, we were happy if
13 you can work everything out. And we encourage you to do
14 that.

15 COMMISSIONER BOYD: I have one piece of advise
16 for Mr. Harris. Please don't use the Hindenberg analogy
17 in further discussion with the role of hydrogen, or you'll
18 force this Commissioner and maybe others in a long lecture
19 about how safe hydrogen is compared to other things. That
20 was a shot at another project that was almost unreserved
21 and probably left as a one-time comment.

22 MR. HARRIS: Sometimes my brain and mouth don't
23 connect. I apologize. You're correct. Hydrogen is used
24 in gas turbans as well. It's very safe when controlled.
25 But that's the only thing hydrogen I could think of

1 besides a balloon. I didn't want to go there. Thanks.

2 HEARING OFFICER KRAMER: Okay.

3 MR. BRIZZEE: Hearing Officer Kramer, this is
4 Bart Brizze.

5 Can I make one more statement for the record?

6 That is we do have Peter Brierty and Stan Hoffman
7 available for testimony.

8 HEARING OFFICER KRAMER: Thank you.

9 Given that we are accepting a Hoffman report as
10 public comment, I don't think we need any further
11 discussion of that issue.

12 Let me return to air quality for just a minute.
13 I think I forgot to bring it with me, but there was a memo
14 from staff. I believe it was on April 30th that was
15 circulated to all the parties, which contains staff's
16 proposal to change the air quality conditions to cue them
17 up with the final determination of compliance version C
18 that we admitted a moment ago.

19 So I'd like to get that into the -- I don't think
20 it has to be in the record. Was that simply a
21 recommendation of your condition language? So it doesn't
22 need to be an exhibit.

23 But I'd like to note that, unless there is
24 objection, that the Committee will be accepting those
25 recommendations and modifying the conditions accordingly.

1 Now of course there's opportunity to file further
2 public comments on that. But absent some arguments to the
3 contrary, that's going to be our intention is to adopt
4 those conditions.

5 MR. KESSLER: Mr. Kramer, staff's comments
6 regarding the PMPD will capture those suggestions we made
7 earlier as well.

8 HEARING OFFICER KRAMER: So we'll have that note.

9 Are there any other topics? We're going to come
10 back to bio once we get the list completed. Do we have
11 any other topics that any party wishes to propose for
12 further discussion or the receipt of additional evidence?

13 MR. KESSLER: Mr. Kramer, we may want to touch on
14 recreation. That was a topic that may have been
15 overlooked by the Committee in the PMPD. That has to do
16 with other consideration of public use area as it may
17 apply to the siting of a project on lands within a coastal
18 zone, which this doesn't qualify. But with lands that
19 have recreational value scenic or visual value.

20 So we had proposed a condition. If the Committee
21 considers that condition to be reasonable and
22 applicable -- in this case, we are also looking to
23 modifying the language to make it become something that is
24 more palatable to the applicant. If they have interest in
25 trying to work with San Bernardino County on how that

1 condition could be developed or -- the concept is for a
2 solar and ecological interpretive center to be included
3 with the project. And the county has some ideas about
4 should that come to fruition, where would that be located
5 and how it should be done. And staff would like to allow
6 the applicant to have some options to figure that out, if
7 applicable.

8 HEARING OFFICER KRAMER: So does that mean you're
9 going to propose modified language for the condition?

10 MR. KESSLER: Yes.

11 HEARING OFFICER KRAMER: That will be in your
12 comments. Will those be filed somewhat in advance of the
13 final deadline?

14 MR. KESSLER: We hope to file it today.

15 HEARING OFFICER KRAMER: So that would allow the
16 applicant and the county and anyone else to then comment
17 in their final comments?

18 MR. KESSLER: Yes.

19 HEARING OFFICER KRAMER: Did you want to make any
20 preliminary comments, Mr. Harris or Mr. Brizzee?

21 MR. HARRIS: Of course. The project is not still
22 in the coastal zone. I think that's the legal trigger
23 here. And I go back to our brief on this issue.

24 Every project we've ever certified has some
25 relationship to recreational value. There are trails

1 around Morrow Bay. There are trails around Medcalf.
2 There are viewing stations around the Delta. They all
3 have arguably some recreational value, because they're on
4 land. So that's a big issue for us.

5 And the cost associated with this is also
6 something that causes problems. The timing -- the
7 Commission actually precludes the sort of construction
8 until we start dealing with this.

9 And finally, I'd like to offer staff the
10 opportunity to withdraw their finding of significant
11 visual impacts. They think people ought to see this.
12 Maybe visual impacts aren't significant. I say that sort
13 of tongue and cheek, but I really think the Commission
14 doesn't want to have a decision that says this is a
15 horrible monstrosity and here's the place the public needs
16 to go to look at it. So this condition ought not come
17 back in.

18 HEARING OFFICER KRAMER: Mr. Brizzee.

19 MR. BRIZZEE: Bart Brizzee from the county.

20 My understanding, again, these settlement
21 negotiations are ongoing between county staff and
22 representatives of the applicant. My understanding is
23 that those discussions have been equally as positive and
24 favorable on this topic as they have been on worker
25 safety.

1 I submitted some comments just to complete the
2 record, but obviously as with worker safety, we prefer to
3 reach an agreement with the applicant as opposed to having
4 it imposed.

5 HEARING OFFICER KRAMER: Thank you.

6 So, Mr. Harris, you must have gotten off close to
7 that line you were talking about there, the messing up a
8 negotiation.

9 MR. HARRIS: No, actually they're going quite
10 well. We do things outside your process that are
11 positive.

12 And Mr. Stewart has been involved in those, and
13 we have an interest in working with the county to put
14 together what would be an interpretive center. We'll
15 solve the problem of trying to put one on federal land,
16 which I don't know where that issue is at as well. But we
17 are making good progress on that.

18 HEARING OFFICER KRAMER: I don't think we
19 consider ourselves to be the only forum in which progress
20 can be made. Thank you.

21 That brings us back to biology then. Have we run
22 out of topics? Any others? Last call.

23 Biology then. As I said before, I think the
24 Committee is interested in updating its knowledge about
25 the latest research and information that informs our

1 assessment of what is likely to happen to the tortoises if
2 they're relocated. I think it would be helpful also to
3 get a briefing about the latest relocation plans and the
4 options. I think Mr. Kessler said there is a couple
5 places they might go -- two, was it?

6 MR. KESSLER: Yes.

7 HEARING OFFICER KRAMER: He said yes.

8 And so if you could put that in context.

9 And then because Mr. Cashen has to go, if we can
10 have him offer his comments and testimony about this, and
11 then we'll probably have to break for lunch. We might get
12 a little bit more in. And then we will hear the rest of
13 the testimony after lunch. So Mr. Kessler, who would you
14 recommend is the best witness to explain the relocation
15 plans?

16 MS. BELENKY: Could I just ask one procedural
17 point?

18 HEARING OFFICER KRAMER: Go ahead.

19 MS. BELENKY: If we don't have a lot of
20 biological testimony left at, say, when you want to break
21 for lunch, would it be possible to go through and just
22 finish it so that some of us could get to our 2:00
23 meeting?

24 COMMISSIONER BYRON: Unfortunately, we cannot.
25 There are Commissioners that have noon meetings, because

1 that's the only time we can schedule them.

2 MS. BELENKY: Okay. Thank you.

3 HEARING OFFICER KRAMER: So Mr. Kessler or
4 Ms. Holmes.

5 MS. HOLMES: I think the staff witness Susan
6 Sanders can give something of an overview, but the
7 detailed discussion I think will be better informed by the
8 participation of the U.S. Fish and Wildlife representative
9 who is not available until 1:30 this afternoon.

10 HEARING OFFICER KRAMER: We'll have to duplicate
11 some of that.

12 MS. HOLMES: We can start with an overview. And
13 if Mr. Cashen needs to leave, perhaps he could present his
14 comments after the overview. Just a suggestion.

15 HEARING OFFICER KRAMER: Okay.

16 MR. HARRIS: So this is public comment more or
17 less coming in from staff. There's no final document with
18 this; right?

19 MS. HOLMES: Staff has not pre-filed anything.

20 MR. HARRIS: Is there anything in particular that
21 Mr. Cashen is sponsoring? I've looked at the documents
22 that say Sierra Club has filed. And I see 2009, 2008
23 reports and 2010 e-mail. None of them from Mr. Cashen.
24 So is it just going to be a similar commentary by Mr.
25 Cashen, or is he actually sponsoring something?

1 HEARING OFFICER KRAMER: I suspect those are
2 informing his opinions he's going to offer.

3 MR. HARRIS: When Gloria returns, we can do that.
4 But we can go on with staff.

5 MS. HOLMES: I apologize I'm not on the service
6 list. Did anybody -- did any of the parties file any
7 declaratory declarations or what was filed yesterday or
8 earlier today just reports?

9 MS. BELENKY: We filed testimony declarations.

10 MS. HOLMES: Thank you. And Western Watershed,
11 and that I received. So in terms of the pre-filed
12 testimony. But individual, we have testimony from CMD as
13 well as Western Water.

14 HEARING OFFICER KRAMER: Let's go off the record
15 for a minute.

16 (Off the record.)

17 HEARING OFFICER KRAMER: Back on the record.

18 Ms. Sanders, you were previously sworn in this
19 hearing?

20 MS. SANDERS: Yes.

21 HEARING OFFICER KRAMER: Ms. Smith is coming
22 back. Is Mr. Cashen going to be available?

23 MS. SMITH: He's calling in right now.

24 HEARING OFFICER KRAMER: Do you think -- does he
25 need to hear what Mr. Sanders is going to say? Or is he

1 familiar with that?

2 MS. SMITH: What are you going to say,

3 Ms. Sanders?

4 I think it's probably fine, because again we're
5 just offering new information as a result of the Fort
6 Irwin outcome. So I think it's sort of -- what do you
7 think, Mr. Kramer?

8 HEARING OFFICER KRAMER: Mr. Cashen, are you with
9 us yet?

10 MS. SMITH: He's calling in right now.

11 HEARING OFFICER KRAMER: Okay. Well, let's let
12 her go ahead.

13 Ms. Sanders, please update us on the current plan
14 for the relocation of the tortoises and whether it's
15 likely to remain the plan or is there some uncertainty
16 even at this time?

17

18 DIRECT EXAMINATION

19

20 MS. SANDERS: First, let me just clarify that the
21 final staff assessment did talk at some length about the
22 uncertainty and hazards of translocation.

23 If you look at page 6.2-48, we quote from the
24 Desert Tortoise Recovery Office. We say, "The risks and
25 uncertainties of translocation to desert tortoise are well

1 recognized in the desert tortoise scientific community.
2 The Desert Tortoise Recovery Office Science Advisory
3 Committee made the following observations regarding desert
4 tortoise translocations. As such, consensus, if not
5 unanimity, exists among the SAC and other meeting
6 participants that translocation is fraught with long-term
7 uncertainties, notwithstanding recent research showing
8 short-term successes and should not be considered lightly
9 as a management option."

10 We talked death and injury can result from
11 translocation. And our analysis was informed by that
12 understanding that translocation is a dangerous thing for
13 desert tortoise, not just for the translocated animal, but
14 for the resident animals as well as.

15 So desert tortoise -- so Bio 9 is our desert
16 tortoise translocation condition. We're going to be
17 getting the changes to that I think this afternoon. But
18 the changes are no different than were filed March 28th.
19 And those are clarification under the process for the
20 desert tortoise translocation plan.

21 The essence of it is, "The project owner shall
22 develop and implement a final desert tortoise relocation
23 translocation plan that is consistent with Fish and
24 Wildlife approved guidelines and meets the approval of
25 BLM" -- excuse me. I didn't know that was crossed out.

1 "BLM authorized officer, Fish and Wildlife Service, and
2 the CPM in consultation with Fish and Game. The final
3 plan needs to be approved by the CPM and by BLM. It has
4 to be consistent with whatever Fish and Wildlife Service
5 current guidance requires."

6 Now on July 30th, staff filed some information
7 regarding updated information regarding desert tortoise
8 translocation for Ivanpah. And at the time, the analysis
9 and final staff assessment looked at the translocation
10 site west of the project area. And that was the one that
11 we described in our analysis. So since then, on July
12 30th, we provided you with the e-mail from Amy Fesnock of
13 the Bureau of Land Management.

14 HEARING OFFICER KRAMER: Should we mark that as
15 an exhibit?

16 MS. HOLMES: We certainly can.

17 MR. HARRIS: Are you going to take that as public
18 comment or -- there's no one here to testify on that
19 issue. The person who drafted the e-mail is not here.

20 I'd hate to make a point, but evidentiary,
21 witnesses, testimony, cross-examination, there's no one
22 here to sponsor that document. I don't mind having it in
23 the record as public testimony, but --

24 MS. HOLMES: Hearsay can come in as part of the
25 evidentiary record as well. It's may be a distinction

1 without a difference.

2 HEARING OFFICER KRAMER: This is an illustrative
3 point Ms. Sanders is making. And so I think we'll let it
4 in.

5 But there was a second part to that e-mail and
6 also contained the re-calculation of the changes to one of
7 the conditions showing that the -- what do we call it?
8 The write a check option in lieu of --

9 MS. HOLMES: The REAT Agency guidance for
10 mitigation cost estimates.

11 HEARING OFFICER KRAMER: Is that all one
12 document?

13 MS. HOLMES: Yes, it is.

14 HEARING OFFICER KRAMER: Mr. Harris, do you have
15 any objection to the rest of that?

16 MR. HARRIS: You might anticipate I would. We
17 can talk about the REAT issue separately. But there's
18 serious legal problems with that document that staff
19 filed, on the day the comments were due on that
20 methodology I might add.

21 HEARING OFFICER KRAMER: Okay. But we can mark
22 the whole thing as -- let me get the exhibit number.
23 Exhibit 316.

24 (Thereupon, the above-referenced document was
25 marked for identification by the Hearing

1 Officer.)

2 MR. HARRIS: Is there anyone available for
3 cross-examination on the second half of that document or
4 is that somebody else?

5 MS. HOLMES: Actually, I believe that Mr. Flint
6 is going to be available later this afternoon. I don't
7 know -- he can certainly talk about the process that was
8 used to develop those numbers, because he was involved.

9 MS. SANDERS: Yeah. That's right.

10 MR. HARRIS: Who's the author of that second
11 piece? Attachment 2.

12 MS. SANDERS: When you say second piece, there's
13 several parts to that filing on July 30th.

14 MR. HARRIS: Attachment 2.

15 MS. HOLMES: There's several parts to that as
16 well. There's changes to the Conditions of Certification,
17 which Susan Sanders is the author of. And then there's
18 the updated Renewable Energy Action Agency guidance for
19 mitigation cost estimates, which she can talk about.

20 But as I said, Mr. Flint, who will be available
21 later this afternoon, was involved in the development of
22 those numbers and has continued to participate.

23 MR. HARRIS: So there's three attachments; is
24 that right? First attachment is the BLM e-mail; right?
25 So that's not Susan.

1 The second attachment is this REAT document. Is
2 that what Mr. Flint would be available to talk about?

3 MS. HOLMES: Yes.

4 MR. HARRIS: And the third one is the revision to
5 the condition, which Ms. Sanders is available to talk
6 about?

7 MS. HOLMES: Correct.

8 MR. HARRIS: Is there only three, Caryn?

9 MS. HOLMES: That's my understanding.

10 MR. HARRIS: Okay. Thank you for the
11 clarification.

12 HEARING OFFICER KRAMER: So that's Exhibit 316
13 marked for identification.

14 Go ahead, Ms. Sanders.

15 MS. SANDERS: So the translocation site that we
16 analyzed in the final staff assessment was west of the
17 project area. Since that time and as described in the BLM
18 memo, a site in the Mojave National Preserve was
19 identified as a possible site. And that has been the
20 subject of analysis by Fish and Wildlife Service, BLM,
21 Fish and Game.

22 There are now two biological opinions, one for
23 each of these sites. One of the exhibits we're proposing
24 to attachment -- we're proposing to submit today is the
25 publicly-available version of the biological opinion for

1 the western site. That's gone through solicitor review.
2 It's public information now. It's misdated April 2009.
3 It's actually April 2010.

4 There's also a biological opinion that has been
5 prepared for this site in the Mojave Preserve. That was
6 just sent to the solicitor's office this week. It's not
7 available for public review.

8 So there are two biological opinions that we
9 can -- both of them have been through most of the review.
10 The first one would require a little bit of revision,
11 because there have been some changes to translocation
12 guidance.

13 Another exhibit that we're going to be submitting
14 is the August 2010 Desert Tortoise Recovery Office
15 guidance on how to prepare a translocation plan. Because
16 a lot that's been happening, the REAT table, the new
17 guidance from the Desert Tortoise Recovery Office to deal
18 with these large projects. And one of things they've done
19 is come up with better guidance on when you do disease
20 testing and guidance on moving the tortoise more than 500
21 meters, you need to do disease testing. Guidance --

22 HEARING OFFICER KRAMER: That involves drawing
23 blood?

24 MS. SANDERS: That's right. And quarantining the
25 animal until the results are available. The new guidance

1 calls for -- this is important -- monitoring not just the
2 translocation individuals, but monitoring the resident
3 population and a controlled population.

4 And the purpose of that new guidance is so you
5 can tease out if you're seeing high levels of mortality as
6 they did at Fort Irwin, you can tease out whether or not
7 those are general environmental factors effecting all
8 tortious, or just the ones you translocated.

9 That's what part of the new guidance is. Those
10 are the kinds of revisions to the BO that's already been
11 through solicitor review for the west of the site. It
12 would need to be tweaked. Brian Croft, who would be
13 available for questions this afternoon, said that would be
14 a very minor change and may not need to go back to the
15 solicitor for recirculation if they made those changes.

16 So we have two sites, two BOs, and both are
17 satisfactory for staff. We were on the phone yesterday
18 with Fish and Game, Fish and Wildlife, the Park Service,
19 BLM, and Energy Commission. And we all agreed that
20 those -- either of those two sites would work. But
21 regardless, the condition that we have written, it doesn't
22 matter which sites you use. The requirement is that they
23 meet the most current Fish and Wildlife Service approved
24 guidance and that they meet all the other agencies that
25 need to approve those kinds of plans. That approval must

1 be met. And I have a high degree of comfort in the
2 rigorousness and the level of implementation from the
3 agencies in applying the guidance that's available based
4 on my past experience.

5 MS. SMITH: Can I just break in for one second?
6 I'm sorry. Mr. Cashen can't get on because WebEx won't
7 let him, saying the meeting has already started. It's
8 rejecting him. Do we have a Plan B?

9 MS. HOLMES: There was an issue with this with
10 Chief Breirty as well, but he was eventually able to.

11 HEARING OFFICER KRAMER: Let's go off the record
12 for a minute then.

13 (Off record)

14 HEARING OFFICER KRAMER: We'll go back on the
15 record then. So Ms. Sanders -- so Mr. Cashen can finish
16 up and have about little less than 20 minutes of our time,
17 could that complete your testimony for the moment?

18 MS. SANDERS: Yes.

19 HEARING OFFICER KRAMER: Okay. So we'll postpone
20 cross-examination of her until this afternoon. Mr.
21 Cashen -- Ms. Smith, do you want to lead him?

22 You're previously sworn in this case; is that
23 correct?

24 MR. CASHEN: Yes.

25 MR. HARRIS: You were out of the room when I

1 asked the question which document is Scott sponsoring or
2 just giving oral testimony?

3

4 DIRECT EXAMINATION

5

6 MS. SMITH: I'll ask him -- well, I'll just do
7 it.

8 Mr. Cashen, are you sponsoring Exhibits 613
9 through 617 that have to do with translocation of Desert
10 tortoise?

11 MR. CASHEN: Yes.

12 MS. SMITH: Have you reviewed recent results from
13 the Fort Irwin translocation effort?

14 MR. CASHEN: Yes, I have.

15 MS. SMITH: As a result of your review of these
16 new results, has your opinion changed on the mortality
17 risk of translating desert tortoise?

18 MR. CASHEN: The most recent information that has
19 been obtained through study of the Fort Irwin
20 translocation process has highlighted some extreme
21 mortality associated with the project. And the numbers
22 associated with the mortality that was observed had been
23 reported in the annual reports submitted in association
24 with that translocation project.

25 MS. SMITH: So can you talk a little bit about

1 what you've learned about the cause of that extreme
2 mortality and how it might relate to the Ivanpah
3 translocation plan?

4 MR. CASHEN: Yeah. I think the most important
5 thing is the numbers that have been observed. And I think
6 those are what it's highlighting.

7 And tortoise were moved in March of 2008. And
8 between March 2008 and December 2009, 44.3 percent of the
9 translocated tortoises were found dead and an additional
10 17.4 considered missing. So those two numbers total over
11 61 percent of the tortoises within about a year and
12 nine months. And those include tortoises that were
13 translocated into a DWMA, which is considered relatively
14 high quality habitat with a low amount of anthropogenic
15 uncertainty. And additional mortality is expected beyond
16 what has been observed so far.

17 The other information that was obtained from the
18 Fort Irwin effort was that monitoring the tortoise is
19 shown to be very problematic. And the common issue has
20 been locating the tortoises after they're released. And
21 the transmitters have been falling off or stopped working.
22 And it's made monitoring success of the translocation
23 effort very difficult and unreliable performing
24 mitigation.

25 And the third piece of information that has come

1 out of this is that priority predation has been a huge
2 source of death with the tortoises that were translocated.

3 There's quite a bit of other information
4 associated with the Fort Irwin project. And one of the
5 things that sticks out to me is that the potential of
6 having a significant impact not only on the tortoises that
7 are being translocated, but on the host population, and
8 that there's a mounting scientific evidence that
9 translocating tortoises into other areas may actually do
10 more harm than good. And that's because there's the
11 potential for introducing diseased tortoises into a
12 healthy population or otherwise mixing healthy and
13 diseased individuals, as well as the effect that
14 augmenting a population with translocated tortoises has on
15 predator populations and the predator/prey -- shift in the
16 predator/prey dynamics that result.

17 And then finally, just amount of competition that
18 may occur when you add additional tortoises to an existing
19 population. And if there's not enough resources to
20 support the additional tortoises, there's a high potential
21 that the entire population could crash.

22 So all these things point to not only the hazards
23 associated with moving tortoises off a site, but hazards
24 associated with tortoises at the receptor site.

25 MS. SMITH: Mr. Cashen, is it your opinion that

1 after certain increment of several years of monitoring
2 that more tortoises could actually perish as a result of
3 the translocation than were actually moved in the first
4 instance?

5 MR. CASHEN: Absolutely. And that is a concern
6 of many researchers that has been highlighted by
7 information obtained through the recent Fort Irwin study.

8 Tortoises -- one of the primary threats to
9 tortoises is -- are several different types of diseases.
10 And if diseased individuals are introduced into an
11 otherwise healthy population, it could spread that disease
12 and cause massive mortality throughout the population, and
13 as well as the other things that I mentioned, such as the
14 augmentation of predator population and the effect of
15 exploitation of resources.

16 MS. SMITH: And Mr. Cashen, is there any reason
17 to believe that translocation efforts at the Ivanpah
18 project should be any more successful than they have at
19 Fort Irwin?

20 MR. CASHEN: I don't think so. I have not seen
21 any information that suggests that they -- that we might
22 expect something different than what occurred at Fort
23 Irwin.

24 MS. SMITH: Thank you, Mr. Cashen. I don't have
25 any further questions.

1 HEARING OFFICER KRAMER: Cross-examination, Mr.
2 Harris.

3 MR. HARRIS: Sure. Couple questions.
4

5 CROSS-EXAMINATION

6 MR. HARRIS: Exhibit 613 is a study by Gowan.
7 That study is dated 2009; isn't that correct?

8 MR. CASHEN: What's the title?

9 MR. HARRIS: It's Exhibit 613 of pre-filed
10 testimony.

11 MR. CASHEN: So there's several -- Gowan has
12 published several papers.

13 MR. HARRIS: My only question was the year. Is
14 that your testimony is that is a 2009 study?

15 MR. CASHEN: I'd have to review that study.

16 MR. HARRIS: So have you not reviewed that study?

17 MS. BELENKY: We also presented that study. He
18 doesn't understand what --

19 COMMISSIONER BYRON: Let's just clarify.
20 Progress report for 2009. I don't see a date on this
21 document as to when it was published.

22 MR. HARRIS: The first 2009 I believe is the
23 publication date.

24 MS. SMITH: The discrepancy is having this here,
25 he doesn't know what number was assigned to each document.

1 So that's what's --

2 MR. CASHEN: I don't have the exhibit list.

3 MS. SMITH: He's supplied the document, but not
4 the exhibit number.

5 MR. HARRIS: How do I ask him about the exhibits?
6 You want me to go by title then?

7 MS. SMITH: Yes.

8 MR. HARRIS: The article by Gowan, "Health Status
9 and Translocated Desert Tortoise", 6/13, that's a 2009
10 study; is that correct?

11 MR. CASHEN: It tabulates the results for 2009,
12 yes.

13 MR. HARRIS: Was it published in 2009?

14 MR. CASHEN: I don't know. I believe it
15 encompassed through the end of 2009, which would suggest
16 it was published the beginning of 2010.

17 MR. HARRIS: If you don't know, that's fine.

18 614 is a 2009 progress report by Barry, et al,
19 "An Evaluation of Desert Tortoise and Their Habitats,"
20 Western Expansion Translocation Area, Fort Irwin
21 Translocation Project, San Bernardino County. That is
22 2009 document as well; isn't that correct?

23 COMMISSIONER BYRON: Mr. Harris, I'm not the
24 witness, but I have the document in front of me. And I'm
25 reading content from it. It says between January and

1 December of 2009. It characterizes data from the study.
2 So it cannot have been published in 2009, in my mind.
3 There's no date that I can see on the document as to when
4 it was published.

5 MS. SMITH: The truth is these documents have
6 been a moving target for us, because we are just getting
7 these documents and other study results as we speak.

8 MR. HARRIS: Let me ask then, when did this
9 document first come into your possession, Mr. Cashen?

10 MR. CASHEN: These documents were produced by the
11 U.S. Fish and Wildlife service upon a FOIA request. And I
12 received them the beginning of this month.

13 MR. HARRIS: Is that also the case for the Dodd
14 report dated 1991?

15 MR. CASHEN: No. That is a study that was
16 published in the journal.

17 HEARING OFFICER KRAMER: Which exhibit is that,
18 Mr. Harris?

19 MR. HARRIS: 616. And then finally the same for
20 Exhibit 617, the 2008 study by Germano. When did that
21 first come into your possession?

22 MR. CASHEN: That was another study that's been
23 published in a scientific journal.

24 MR. HARRIS: I don't have any substantive
25 remaining questions for this witness.

1 HEARING OFFICER KRAMER: Any other party wish to
2 ask some questions?

3 Mr. Cashen, one question for you. It's a
4 question we -- dialogue we had in the Calico hearings
5 recently. Some of the other experts appear to believe
6 that -- well, they appear to accept that some tortoise
7 mortality will occur and believe that it is compensated
8 for by the setting aside and improvements to habitat that
9 is also -- that is required of the applicants in these
10 various cases. Do you share that opinion?

11 MR. CASHEN: Not necessarily, no.

12 HEARING OFFICER KRAMER: Unequivocally no or not
13 in all cases? Or could you elaborate?

14 MR. CASHEN: Well, I think what this theory is
15 has been expressed by staff -- in theory, staff assessment
16 produced for these projects is that carrying -- by
17 increasing carrying capacity as the compensation site that
18 would, in effect, mitigate the loss of tortoises from the
19 project site due to mortality. I have not -- that's a
20 theory that lacks substance. And I have not seen anything
21 to suggest that would, in fact, occur. In fact, what I
22 see integrated into the Conditions of Certification
23 suggests the opposite.

24 In talking to Dr. Berry and in review of the
25 literature that exists on the status of the desert

1 tortoise, there are no sites out there where tortoise
2 populations are increasing. And there are very few, if
3 any, where the population is even stable. So if that is,
4 in fact, the case, then providing compensation by
5 purchasing land where a population is declining would not
6 offset the loss of -- would not offset the mortality.

7 HEARING OFFICER KRAMER: Do you believe it's
8 possible to increase the carrying capacity of habitat?

9 MR. CASHEN: It is. But it requires an extensive
10 amount of scientific study and management actions that
11 have not been incorporated into the Conditions of
12 Certification.

13 HEARING OFFICER KRAMER: Let me ask Ms. Smith,
14 are you planning on offering some suggestions as to how
15 the conditions can be improved along the lines of Mr.
16 Cashen is suggesting?

17 MS. SMITH: Not today. I mean, we will be
18 responding. As you know, there's been a project that has
19 preoccupied us a bit the last week or so. But we will be
20 responding by the September 3rd.

21 I can't -- I'm not necessarily forecasting that
22 we have solutions to this problem, given there's just the
23 whole issue that compensation lands don't do anything for
24 an existing population that's being decimated. So that's
25 just a construct that we find ourselves, and we don't know

1 of an affirmative solution that can help that.

2 HEARING OFFICER KRAMER: Okay. Thank you.

3 MR. HARRIS: Can I ask one more question?

4 HEARING OFFICER KRAMER: Go ahead.

5 MR. HARRIS: Mr. Cashen, you are concerned about
6 translocations. Are there any circumstances under which
7 you think tortoises ought to be translocated?

8 MR. CASHEN: There are circumstances where it's
9 possible that translocating animals provides a
10 conservation value.

11 MR. HARRIS: What are those cases?

12 MS. SMITH: If you know.

13 MR. CASHEN: Well, I think the most obvious is
14 reestablishing a population that has been extirpated from
15 an area.

16 Maybe the California condor provides a good
17 example that people can relate to; reestablishing the
18 condor from the brink of extinction back into the wild
19 where there were no wild condors left. And through
20 management action, the individual condors were raised and
21 then translocated, released into the wild to reestablish a
22 population is viewed as success, in that case.

23 MR. HARRIS: Sorry. I thought you were finished.

24 MR. CASHEN: That's okay.

25 MR. HARRIS: So setting aside condors, how about

1 desert tortoise relocation? Are there circumstances under
2 which you believe desert tortoise can be translocated or
3 relocated?

4 MR. CASHEN: Well, I consider that two different
5 actions, relocating and translocating.

6 MR. HARRIS: Let's take them separately then.
7 Let's start with translocation. Are there circumstances
8 under which there are biologically beneficial reasons to
9 translocate desert tortoise?

10 MR. CASHEN: Yes.

11 MR. HARRIS: What are those circumstances?

12 MR. CASHEN: Well, if there was a situation that
13 was similar to what I expressed about the condor where
14 there wasn't an area where tortoises had been widely
15 extirpated from their range and that the management goal
16 was to try to reestablish a population in that area, then
17 that might -- there might be conservation value to that.
18 However, those issues associated with translocating
19 tortoises would need to be considered before any such
20 effort was undertaken.

21 The issues that I mentioned earlier, such as
22 spreading disease and augmentation of predator population
23 and evaluation of resources, these are things that require
24 quite a bit of effort and scientific study before one can
25 even begin to think that there might be conservation

1 value. And a lot of times, despite the best intention,
2 things don't work out the way we intend them to.

3 MR. HARRIS: Okay. So you're saying, yes, there
4 are circumstances under which you could translocate desert
5 tortoise?

6 MR. CASHEN: It's somewhat of a value-based
7 judgment.

8 MS. SMITH: Please don't speculate. And there's
9 no reason for him -- we can do a parade of hypotheticals.
10 Now you're putting words in his mouth saying there are
11 circumstances.

12 MR. HARRIS: I'm just trying to understand his
13 answers. I really am.

14 Let's go then to relocation. First off, how do
15 you define relocation versus translocation?

16 MR. CASHEN: Well, I was going to ask you that.

17 MR. HARRIS: I'm not the desert tortoise
18 biologist. You said you think there is a distinction,
19 because you said that in one of your answers.

20 MS. SMITH: Again, I'm going to object. If we
21 want to keep this to solar projects, but unless we are
22 outside the context of a solar projects, I don't see any
23 value of talking about any other construct because we're
24 here today trying to get to this evidentiary hearing on a
25 solar project.

1 HEARING OFFICER KRAMER: He hasn't dragged it out
2 yet. And he is asking for a definition that might help
3 explain the answers. So overruled.

4 MR. HARRIS: Do I need to restate the question?

5 HEARING OFFICER KRAMER: Mr. Cashen, do you
6 remember the question?

7 MR. CASHEN: I think I do. I mean --

8 HEARING OFFICER KRAMER: Let's have Mr. Harris
9 restate.

10 MR. HARRIS: What is your understanding of the
11 term "relocation" versus "translocation?"

12 MR. CASHEN: Well, there is some disagreement
13 among the wildlife professionals about the meanings of
14 these various terms.

15 So I will say that my interpretation of a working
16 definition would be one in which a relocation is moving an
17 animal from its home range to some other location.

18 A translocation would have a broader definition
19 and would include captively-raised animals, such as what
20 was done with condors, in which animals are moved into an
21 area where they have historically occurred.

22 MR. HARRIS: So as a desert tortoise biologist,
23 do you have a preference for relocation versus
24 translocation of animals?

25 MR. CASHEN: I think what's important is the

1 actual action that's occurring and not necessarily the
2 definition or the term that is being used. So it depends
3 on what you're doing, whatever you want to call it. And
4 it means less to me than what is actually occurring. So
5 if you maybe want to describe what it is you're planning
6 on doing, I could provide an opinion on that.

7 MR. HARRIS: Well, I guess I'm -- is it your
8 opinion that relocation is always preferable to
9 translocation?

10 MS. SMITH: Object again. I don't know how that
11 has any merit with what we're talking about here. The
12 Fort Irwin project was a translocation project. I'm
13 assuming you've got a translocation project here. He's
14 testifying on translocation.

15 If you want to provide us some other documents
16 that he can review on relocation or something you want him
17 to review about the distinction, he'd be more than happy
18 to do that.

19 I'm not understanding what the distinction has to
20 do with the Fort Irwin translocation plan and the results
21 of that. We're talking -- I brought him on to talk
22 about -- I mean, you're the one that's rehashing old news
23 here, Mr. Harris.

24 MR. HARRIS: You're the one that wanted
25 testimony. I was perfectly happy with the document the

1 way it was.

2 HEARING OFFICER KRAMER: Is that an objection
3 about the relevance?

4 MS. SMITH: Yes.

5 HEARING OFFICER KRAMER: Overruled.

6 Go ahead, Mr. Harris.

7 MR. HARRIS: The question was: Do you prefer
8 relocation to translocation as a desert tortoise
9 biologist?

10 MR. CASHEN: I think it depends on the situation.

11 MR. HARRIS: Let's think about the situation at
12 Ivanpah. At Ivanpah, do you prefer relocation or
13 translocation?

14 MR. CASHEN: Depends -- again, it depends on the
15 situation where you're going to relocate, where you're
16 going to translocate.

17 MR. HARRIS: The relocation occurs in the
18 relocation areas identified to the west of the project
19 site and to the north of the project site.

20 The translocation would occur according to the
21 biological opinion and the draft biological opinion.

22 My question to you is: Do you believe that
23 relocation is preferable to translocation for the Ivanpah?

24 MR. CASHEN: I would have to review the
25 information associated with each of those proposals.

1 MR. HARRIS: I think I'm asking you to review the
2 information that's already before you in the record. You
3 know about the relocation from the hearings. You know
4 about the translocation from the testimony you are
5 sponsoring, the exhibit you sponsored. Those are the
6 facts I'd like you to have in mind.

7 And the question is simply: Do you prefer
8 relocation to translocation on the facts that are parts of
9 your testimony?

10 MR. CASHEN: Well, I'm sorry, but I'm not going
11 to be able to answer that question without reviewing
12 information. I have not been involved in the Ivanpah
13 proceedings since January, more or less. And I've been
14 involved in a lot of other projects since then.

15 My testimony today related to the results of the
16 Fort Irwin project and how that might apply. I do not
17 have the specific -- I do not recall all the specific
18 details of the applicant's proposed relocation and
19 translocation plan.

20 MR. HARRIS: Okay. I thought it was a question
21 on your testimony. But if you don't have more detailed
22 answer, that's fine. Thank you.

23 HEARING OFFICER KRAMER: Any other questions for
24 Mr. Cashen?

25 Okay. Mr. Cashen, thank you.

1 MR. CASHEN: Thank you.

2 HEARING OFFICER KRAMER: Enjoy your meeting this
3 afternoon. And we are going to go to lunch as predicted.
4 Let's be back at 1:10. We're off the record.

5 (Thereupon a lunch recess was taken
6 at 12:08 p.m.)

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1 AFTERNOON SESSION

2 1:16 P.M.

3 HEARING OFFICER KRAMER: Let's go back on the
4 record.

5 On my table when I got back was an e-mail from
6 Kristen Berry -- sorry. My fault. It was Exhibit 613.
7 Thought it was new. So we're back then. We finished with
8 Dr. Cashen -- Mr. Cashen.

9 And we might as well go back -- we were going to
10 have a witness from Fish and Wildlife; correct -- or are
11 they at 1:30?

12 MS. HOLMES: Yes.

13 MR. CROFT: This is Brian Croft from Fish and
14 Wildlife Service.

15 HEARING OFFICER KRAMER: Had you do you spell
16 your last name, Brian?

17 MR. CROFT: C-r-o-f-t.

18 HEARING OFFICER KRAMER: Thank you. That's for
19 our court reporter's benefit.

20 Okay. Let's finish then with Susan Sanders, and
21 then we'll go on to other witnesses.

22 So we may have caused you to truncate what you
23 wanted to say today. So, Ms. Holmes, do you want to ask
24 any other questions?

25 MS. HOLMES: I think we have a couple of

1 different ways to approach this.

2 One is to simply have Ms. Sanders go condition by
3 condition changes that staff is proposing.

4 Another is to sort of go topic by topic. So for
5 example, we've talked about translocation at this point.
6 We can continue to have her talk about translocation, and
7 then we can handle rare plants separately or whatever.
8 We're indifferent. Ms. Sanders is prepared to talk about
9 it either way, as is the staff plant witness.

10 HEARING OFFICER KRAMER: Well, since I don't
11 think we're expecting to go as long as we have in the
12 past -- any protests? Why don't we just do them all at
13 once.

14

15 DIRECT EXAMINATION (cont'd)

16 MS. HOLMES: Okay. I'll ask you just to
17 summarize. And there are a couple of follow-up questions
18 I'll have when you're finish based on some of the
19 discussions we heard earlier this morning.

20 Ms. Sanders, why don't you summarize -- my
21 recollection from earlier the morning was that we had
22 proposed changes to Bio 9, 12, 17, 18, and proposed Bio
23 21. So if you'd like to walk through those and summarize
24 the changes I think that would be helpful.

25 MS. SANDERS: Let me sum up, just to give you an

1 overview first as to what prompted our changes.

2 HEARING OFFICER KRAMER: Some people apparently
3 are looking for the written reduction of these. Do we
4 have that now?

5 MS. HOLMES: Some of these changes were reflected
6 in the July 30th filing. Others are new. And Ms. Sanders
7 is prepared to describe which are which and why there are
8 changes from the July 30th filing as she walks through the
9 conditions.

10 HEARING OFFICER KRAMER: And then those changes
11 from July 30th we don't have?

12 MS. HOLMES: July 30 changes you do. What you
13 don't have are the additional changes.

14 HEARING OFFICER KRAMER: Go ahead.

15 COMMISSIONER BYRON: One moment, please. So that
16 would be Attachment 3 to the memorandum sent to
17 Commissioners on July 30th that we're talking --

18 MS. HOLMES: Excuse me. Yes. July 30, 2010,
19 filing the updated guidance. It had the memo -- had the
20 memo, the e-mail, and the Attachment 1. Attachment 2 was
21 the updated table. And Attachment 3 was proposed changes
22 to Condition of Certification.

23 Ms. Sanders, as you walk through the conditions,
24 for purposes of keeping the record clear, why don't you
25 identify where there are changes in addition to those that

1 were identified in that filing?

2 HEARING OFFICER KRAMER: Just note that's Exhibit
3 316.

4 MS. SANDERS: Right. Thank you.

5 Before I go walking one by one through the
6 conditions that have changed, let me just give you an
7 overview of what prompted staff's changes and summarize
8 for you where in the PMPD. You'll have a copy of this
9 this afternoon.

10 MR. KESSLER: Either late today or tomorrow.

11 MS. SANDERS: Most changes are reflecting an
12 update from either staff assessment addendum or the
13 changes that we submitted in March or that were the
14 compilation -- the March 29th compilation of edits,
15 because some portion of the PMPD did not reflect those.
16 The PMPD edits will look like a lot of changes, but
17 they're simply reflecting the ones that have been filed.
18 For example, Bio 18 is almost entirely the final staff
19 assessment addendum changes. One exception which we can
20 talk about, just a misidentification of one plant and that
21 was corrected.

22 The July 30th transmittal is just to refresh your
23 memory, which is now Exhibit 316.

24 HEARING OFFICER KRAMER: Yes.

25 MS. SANDERS: That transmitted the REAT cost

1 estimates, the updated guidance for desert tortoise
2 translocation plan development, and then we have the
3 e-mail summarizing the changes and the translocation plan.

4 And we made changes in the July 30th submittal
5 reflecting this new REAT guidance. The REAT Agencies,
6 which are Fish and Game, Fish and Wildlife, BLM Management
7 Commission have been working to come up with a consistent
8 comprehensive way to come up with security estimates for
9 land acquisitions. That's an element in all of our
10 conditions that require that, one that really reflects
11 reality. So that was important to make those changes.

12 In addition to that change, we added one more to
13 that Bio 17, the desert tortoise compensatory mitigation.
14 We made it clear if there are subsequent changes to the
15 REAT table, if there's further refinement, that the
16 applicant doesn't have to go back and get an amendment.
17 But most current REAT guidance is what's going to be
18 applied to the security estimate.

19 And then finally, the changes that were made that
20 you have not seen yet, really we compared the BLM
21 Environmental Impact Statement with what we had in the
22 PMPD. And our goal was to achieve maximum consistency.
23 So in the transmittal from John Kessler, you'll see a
24 summary of that. For the most part, the Environmental
25 Impact Statement and the PMPD are quite consistent. They

1 use more or less the same mitigation measures that we do
2 from Bio 1 through Bio 20, but they have some additional
3 ones. And some of those prompted a few minor edits to our
4 conditions. I'm going to go through which ones those are.

5 And one of them required an entirely new
6 condition. And that condition is to monitor for bird and
7 bat deaths, the carcass counts, and take adaptive
8 management measures if that proves to be a problem. And I
9 can go through the specifics of that if you'd like. But
10 it's similar to what's been put into all the more recent
11 solar projects. You've probably seen versions of this if
12 you're working on other solar projects. This is to make
13 sure we're not getting mortality from birds or collisions
14 with solar facility.

15 So the goal all of our changes were basically for
16 consistency, consistency with the final staff assessment
17 addendum, with the March 29th compilation of edits, with
18 the REAT cost estimate we have in all of our other
19 Conditions of Certification for all the other solar
20 projects, with the BLM final Environmental Impact
21 Statement. And just so what we're getting in Ivanpah is
22 as close as possible to what you're seeing in the other
23 solar projects in the final EIS.

24 So if you'd like, I can go through some of the
25 changes of the conditions. Would that be helpful or is

1 that --

2 HEARING OFFICER KRAMER: Is anybody interested in
3 hearing the details?

4 Actually, I think it would be a good idea,
5 because if there are some minor disconnects, then we'll
6 have the opportunity to have a dialogue rather than us
7 trying to have to figure it out on our own.

8 MS. SANDERS: Just briefly, 5-6, the Worker
9 Environmental Awareness Program, the only change to that
10 was the one that came about from the March 29th. That was
11 simply to allow Fish and Game and Fish and Wildlife the
12 opportunity to review that document.

13 The desert tortoise translocation plan I
14 mentioned earlier, that's Bio 9. There are no changes to
15 that, except as we made in the March 29th compilation of
16 edits.

17 Bio 11, the avoidance and mitigation measures,
18 again that's more or less the March 29th compilation of
19 edits.

20 For Bio 15 and Bio 12 -- excuse me -- we have 8.
21 Big change here. And this was to achieve consistency with
22 what we're doing on all the other projects. The Fish and
23 Wildlife Service has come up with a Regional Management
24 Raven Management Program to implement their environment
25 assessment for -- as you know, ravens are a big problem

1 for desert tortoise. It's one of the things that the
2 agency most wants to tackle, and it needs to be done in a
3 regional comprehensive way.

4 So in the past couple of months, Fish and
5 Wildlife Service has developed a program where they apply
6 a fee to all the new projects -- all projects in the
7 desert, a per acre fee of \$105 per acre and they use that
8 to implement the actions described in the environmental
9 assessment. And so that's something we've added to all of
10 our other solar projects, and we've added it to this as
11 well. If you'd like, I can read you the language.

12 HEARING OFFICER KRAMER: I don't think you need
13 to, unless somebody else wants it.

14 MR. HARRIS: Since it's going go -- go through
15 each of these later. I'll hold my questions for now.
16 Should I hold my questions?

17 HEARING OFFICER KRAMER: I think that would be
18 best.

19 MS. SANDERS: So we added the raven requirement
20 and the verification to make sure it's paid.

21 HEARING OFFICER KRAMER: And the exact language
22 will be in your comments?

23 MS. SANDERS: Yes. And they're the same. If you
24 look at almost any other solar project that's been filed
25 in the past couple of months, you'll see the same

1 language.

2 For Bio 13, weed management, just the same March
3 29th changes.

4 And for Bio 14, this is the closure vegetation
5 and rehabilitation plan. We needed to make some changes
6 to achieve consistency with the BLM's final Environmental
7 Impact Statement.

8 So there are four items that were in the BLM's
9 EIS, which is a product of their working with the
10 applicant trying to finalize the plan. They made quite a
11 bit of progress on that. So I think they listed verbatim
12 the four additional items: Long-term stockpile shant be
13 more than six feet high, et cetera. We've added those
14 four items to our condition so that the BLM and the PMPD
15 will be the same.

16 For desert tortoise compensatory mitigation, Bio
17 17, I think I described the fact that these changes were
18 already included in the July 30th staff transmittal. They
19 included the REAT table. They also include -- to be
20 consistent with what BLM is doing and to fully describe
21 what is planned by way of mitigation, describes the BLM
22 one to one mitigation, which is going to consist of
23 putting desert tortoise exclusion fences on at least 15
24 miles of roads and then closing and rehabilitating some at
25 least 50 routes in the DWMA.

1 And those are actions that will be taken in the
2 Northeastern Mojave Recovery Unit area. And we
3 incorporated this, because it's BLM mitigation, but it's
4 nested within ours. And we require this as well for it to
5 fully mitigate for impacts to desert tortoise.

6 Now, you've seen all this in the July 30
7 submittal. The one thing you didn't see is a minor tweak
8 I just mentioned if the REAT has more current guidance for
9 the cost estimate, that will be applied.

10 COMMISSIONER BYRON: Do we have any sense as to
11 when REAT will close down -- I should say finalize their
12 cost information?

13 MS. SANDERS: I think it's very close to final.
14 I just didn't want to close the door on more
15 opportunities. Scott Flint will be here later, and he
16 would be able to answer that better than I.

17 Bio 18, which is the special status plant
18 condition, as I said, again, that's all just updating it
19 to be similar to what was in the addendum, except there
20 was one little misidentification of small-flowered
21 androstephium. And that's been described in the submittal
22 that the applicant's already provided. And Misa is here
23 to explain it further. And the applicant's botanical
24 expert is also here if there is a question. It's a minor
25 thing.

1 Oh -- and, of course, anything that has potential
2 compensatory mitigation land acquisition, we also included
3 the REAT change to that. So for the burrowing owl, for --
4 what else is required?

5 MR. KESSLER: The waters in the state.

6 MS. SANDERS: Waters of the state, desert
7 tortoise compensatory mitigation and rare plant land
8 acquisitions all reflect the new REAT numbers.

9 MR. DE YOUNG: Which condition numbers are
10 those?

11 MS. SANDERS: That would be -- so it would be 17,
12 18 -- oh, Bio 19, bighorn sheep mitigation, and Bio 20.

13 MR. HARRIS: 17.

14 MS. SANDERS: And 16. I'm sorry. Let me go
15 through it again.

16 Bio 16, burrowing owl.

17 Bio 17, desert tortoise compensatory mitigation.

18 Bio 18, special status plant mitigation.

19 And not Bio 19. There's no land acquisition with
20 that.

21 Bio 20, stream bed measures.

22 Any other? That's it.

23 All right. Those are the ones that you'd apply
24 the REAT security cost estimate.

25 Bio 189, the bighorn sheep mitigation. We had a

1 couple of minor changes to make sure we're consistent with
2 the BLM final impact statement. That was adding a couple
3 lines. One, there be weed control around the water source
4 and that there would not be barbed wire fence in the
5 northern parameter of Ivanpah 3. Those are two measures
6 in the Environmental Impact Statement we also wanted in
7 here to be consistent.

8 For Bio 20, all the changes are as described in
9 the March 29th compilation of edits, plus the addition of
10 the REAT security estimate.

11 And then there is the new one, Bio 21, avian and
12 bat monitoring and management plan. Basically, the
13 applicant needs to develop a plan to search for carcasses
14 of birds and bats. If they find any dead birds and bats
15 that are project-related, they need to consult with the
16 agencies, Fish and Wildlife, Energy Commission, BLM, and
17 determine if adaptive management is warranted. And the
18 plan will include adaptive management measures to deal
19 with unanticipated bird or bat deaths.

20 And that's about three or four paragraphs. I
21 don't think I'll read it now. It's actually identical to.
22 What you're seeing in the other solar projects, more or
23 less.

24 So that's it. That's the summary of the changes
25 to staff's edits to the PMPD.

1 MS. BELENKY: Was that last one 19?

2 MS. SANDERS: Twenty-one. It's new. And the
3 language is different from the BLM. It's a little more
4 detailed than what's in the BLM Environmental Impact
5 Statement, but the same as what's in the other solar
6 project staff assessments.

7 MS. HOLMES: Thank you, Ms. Sanders.

8 I have a couple follow-up questions based on some
9 testimony that was given earlier this morning.

10 You testified earlier that there were two
11 biological opinions that have been prepared with respect
12 to translocation plant. Can you clarify as to whether or
13 not those are draft and whether or not they're publicly
14 available?

15 MS. SANDERS: Right. My apologies. I should
16 have said draft biological opinion. Neither one of them
17 is finalized. And the one that's from April 2010 is
18 publicly available. The other one is being reviewed.

19 MS. HOLMES: Thank you.

20 And there was some Committee questions to Mr.
21 Cashen regarding the types of measures that could be
22 incorporated in a translocation plan that would help
23 increase the carrying capacity of the land to which the
24 desert tortoise are translocated.

25 Could you testify as to whether or not -- what

1 types of measures those might be and whether or not those
2 would be incorporated in this translocation plan?

3 MS. SANDERS: Yes, I didn't really agree with Mr.
4 Cashen's characterization of the value of what we proposed
5 by way of mitigation. I think the desert tortoise
6 recovery plans are full of information about what you need
7 to do is acquire land and develop a management plan to
8 address the threats that are making desert tortoise
9 decline. So that might include fencing to keep out
10 off-road vehicles. Might include weed control. It might
11 include a number of things that are described in detail in
12 the recovery plans.

13 Furthermore, I think there is going to be quite a
14 bit of mitigation benefit to what's being proposed as part
15 of the BLM mitigation; fencing off some routes that are
16 known sources of mortality and closing off some routes and
17 doing some habitat restoration on routes in the DWMAs
18 would also be very helpful.

19 HEARING OFFICER KRAMER: You're talking about
20 vehicle routes?

21 MS. SANDERS: Yes. Maybe Tom Hurshman wants to
22 talk more about this, but there are lots of routes that
23 shouldn't be used in the DWMAs that are a source of
24 mortality. If you close them off and disguise them and
25 make them no longer look like routes, you add vegetation

1 or otherwise bring them back to a more natural state,
2 vehicle use goes down and habitat quality goes up.
3 There's more forage.

4 MS. HOLMES: And these are the types of measures
5 that you expect to see associated with this project?

6 MS. SANDERS: Absolutely. Every one of the
7 acquisitions that happens needs to be accompanied by a
8 management plan that describes what you're going to do
9 with the required land to make it better for desert
10 tortoise. Increase the numbers by tackling the threats
11 that are so damaging to desert tortoise.

12 MS. HOLMES: Finally, there was some testimony by
13 Mr. Cashen this morning about the risks associated with
14 translocation due to disease. Is it your opinion the new
15 guidance that's been recently made available helps address
16 some of those concerns?

17 MS. SANDERS: I do think that was part of the
18 motivation for creating those new guidelines was to get
19 some standards for disease testing that all agency folks
20 and all the experts agree to. And Brian Croft is
21 available and can talk about this if there's more
22 questions.

23 MS. HOLMES: Is quarantine part of that proposal
24 as well?

25 MS. SANDERS: Yes. So you don't contaminate a

1 population that doesn't have a disease with disease.

2 MS. HOLMES: It isn't just testing; it's testing
3 and separation until you're sure that the population is
4 not going to infect the new population?

5 MS. SANDERS: Correct.

6 MS. HOLMES: Thank you. I think those are all of
7 the direct questions we have.

8 HEARING OFFICER KRAMER: The applicant,
9 cross-examination?

10 MR. HARRIS: I was going to ask to go last.

11 HEARING OFFICER KRAMER: Would you like to be
12 last?

13 MR. HARRIS: I would, actually.

14 HEARING OFFICER KRAMER: Other parties?

15 MS. BELENKY: I --

16 DR. CONNOR: Mr. Kramer, I have a question.

17 HEARING OFFICER KRAMER: Dr. Connor, go ahead.

18

19 CROSS-EXAMINATION

20 DR. CONNOR: Is it correct that Bio 17 no longer
21 requires acquisition or replacement habitat in the
22 Northeastern Mojave Recovery Unit?

23 MS. SANDERS: It never did. Always was
24 acquisition within the range of the desert tortoise. The
25 recovery actions, the fencing and the route closures, have

1 to happen in the northeastern Mojave recovery.

2 DR. CONNOR: Okay. Thank you.

3 HEARING OFFICER KRAMER: Ms. Belenky.

4 MS. BELENKY: Yes. I think I just have one
5 question, and then Ms. Anderson has a few questions.

6 Ms. Sanders, you've testified that you feel that
7 the staff assessment -- I guess the revised staff
8 assessment all put together did analyze the impacts of
9 long-term distance translocation on desert tortoise, or at
10 least mentioned those issues.

11 To your knowledge, has there been any specific
12 study of the impacts on desert tortoise of moving
13 tortoises from this site into the Mojave Preserve? And
14 have there been any studies yet done on the
15 post-population within the preserve?

16 MS. SANDERS: Have studies been done on the
17 effect of transporting tortoise from the Mojave Preserve?

18 MS. BELENKY: That's right.

19 MS. SANDERS: I don't know of any studies like
20 that.

21 MS. BELENKY: Thank you.

22 MS. SANDERS: Maybe Brian Croft would like to
23 answer that question, since he might know more.

24 MR. CROFT: I don't know of any studies of
25 translocation from that area to the Preserve. I think the

1 closest area where I know a study that has been done is at
2 the large scale study site LSTS, in Nevada over near Jean.
3 I think there was a study that was published in 2007.
4 That would probably be the closest geographically.

5 MS. BELENKY: Was that study provided to this
6 process as an exhibit?

7 MR. CROFT: I'm not sure.

8 HEARING OFFICER KRAMER: Mr. Croft, before you go
9 any further, I don't recall that you participated in this
10 proceeding before; is that correct?

11 MR. CROFT: Correct.

12 MS. SANDERS: Excuse me, Caryn, issue of how Fish
13 and Wildlife Service is in this proceeding.

14 MS. HOLMES: Excuse me?

15 HEARING OFFICER KRAMER: I thought he was Fish
16 and Game.

17 MS. HOLMES: Fish and Wildlife Service, and
18 they're allowed to offer comments and respond to
19 questions --

20 HEARING OFFICER KRAMER: No, I understand. I
21 just had him in the wrong category. So never mind. Go
22 ahead and answer the question then.

23 MS. BELENKY: I think he said no.

24 MS. ANDERSON: This is Ileene Anderson with
25 Center for Biological Diversity.

1 Have a question on the avian and bat monitoring
2 management plan. This is the first I've seen this Bio 21.
3 And I'm glad to see it in here.

4 My question would be though what's the frequency
5 of monitoring? I see the frequency of the reporting. But
6 my concern specifically is if there is mortality or
7 injury, you know, easily these tortoise recoveries can go
8 away through coming and picking them up, et cetera. Is
9 there a specified time frame on how this is going to
10 happen as far as hourly? Is it the whole --

11 MS. SANDERS: The BLM Environmental Impact
12 Statement calls for every two weeks. Our condition calls
13 for development of a plan where we would review what
14 they've proposed by way of frequency of monitoring, but
15 you can't just go out and count number of carcasses. You
16 need to have an estimate of what you're missing by way of
17 scavenging. You need to do scavenging trials. You need
18 to know what your searchers are missing because they don't
19 see it. There's variations between searchers and there's
20 different times of the year. That needs to be factored
21 into the plan.

22 You may want to parcel out your surveys so that
23 you're concentrating more in certain areas, do a subset.
24 All these things, it more complicated than go out and look
25 for carcasses every two weeks. You need a

1 well-thought-out plan. And that's why our condition is
2 more detailed. It could be every two weeks per BLM's
3 guidance, but we want more detail on how it's done.

4 MS. ANDERSON: And then following onto that, I
5 don't really see a time line for how long the monitoring
6 is going to be over years. I mean, it looked like first
7 year adaptive management recommendations for additional
8 monitoring. But then later on it talks about, you know,
9 reports due every year and so that's --

10 MS. SANDERS: That's to be determined by all the
11 parties reviewing the plan. So the agency folk, CPM and
12 BLM, will decide whether or not. If you have three years
13 of intensive monitoring, fine. No evidence of mortality,
14 you might want to scale back on your efforts. About if
15 you're finding big problems, you might want to institute
16 quarterly monitoring. So there's that flexibility built
17 into it.

18 MS. ANDERSON: But certainly more than a single
19 year's worth of data.

20 MS. SANDERS: Yes. It says after -- let me see
21 what it says.

22 Quarterly monitoring, so every year an annual
23 report. "Quarterly monitoring report shall continue until
24 the CPM, in consultation with Fish and Game, Fish and
25 Wildlife determine whether more years of monitoring are

1 needed and the mitigation adaptive management measures are
2 necessary. After two years, project owner/contractor
3 prepare a report describing the results and then that
4 report will be submitted to the agencies."

5 So it's up in the air, as it should be, really.

6 MS. ANDERSON: Thank you.

7 HEARING OFFICER KRAMER: Any other party?

8 Mr. Harris.

9 MR. HARRIS: Yeah. Thank you.

10 Couple of questions. I really want to focus in
11 on the REAT issues, because that's the one --

12 MS. HOLMES: At this point, can we bring Mr.
13 Flint to the table?

14 Scott Flint just came into the hearing room and
15 apparently left. But since he was -- he was involved with
16 the development of the table, I suggest it would be
17 beneficial to have him be part of the discussion.

18 MR. HARRIS: Can we put a transmitter on him so
19 we can track him?

20 COMMISSIONER BYRON: Mr. Flint, your presence is
21 requested.

22 And I'd like to take this opportunity to welcome
23 you to the Energy Commission. I didn't have a chance to
24 welcome you since you joined us. Thank you.

25 MR. FLINT: Thank you.

1 MS. HOLMES: By way of introductions, and for
2 purposes of the record, Mr. Flint is an employee of the
3 California Energy Commission. And before he came to the
4 Commission, he worked for the California Department of
5 Fish and Game and was heavily involved in the REAT
6 process.

7 Currently, staff is providing information to the
8 record about various proposed changes of Conditions of
9 Certification and the applicant has questions on the
10 incorporation of numbers from the REAT process.

11 So Mr. Flint, that's why we've asked you to join
12 us here today.

13 HEARING OFFICER KRAMER: Mr. Flint, were you
14 previously sworn in this case?

15 MR. FLINT: Yes, way back in the earlier
16 hearings.

17 HEARING OFFICER KRAMER: Still in this year
18 though?

19 MR. FLINT: Yes.

20 HEARING OFFICER KRAMER: Go ahead, Mr. Harris.

21 MR. HARRIS: Thank you.

22 And Caryn, I'm going to have you set up all my
23 cross, because it will be a lot shorter. That was
24 beautiful. Thank you.

25 The REAT process is a thing -- what kind of

1 bothers me most about what I saw in the filing on the
2 30th. That process grows out of SB 34 or SB -- what is
3 it? X834 in the special session? That's pretty much the
4 right legislation that's given rise to this mitigation
5 process; is that right, Scott?

6 MR. FLINT: Both. Actually, both. So if you're
7 referring to the cost table, for instance, as an example,
8 that's a tool that would work for both -- that would be
9 part of the SB 34 process, but also could work for just a
10 general in loop mitigation approach that project that may
11 not be qualified for SB 34. So it's not just SB 34. But
12 it's meant to address any process that would allow payment
13 of fees to accelerate the mitigation.

14 MR. HARRIS: Okay. But for our purposes, this
15 table is based on the authorities that are granted to
16 State agencies through SB 34; is that correct?

17 MR. FLINT: From the standpoint that there would
18 be -- that we've calculated in here -- we have spaces in
19 here that calculate administrative costs associated with
20 land acquisitions and NFWF fees. Those are -- if not
21 specifically, but those kind of fees are part of the SB 34
22 structure that's envisioned and outlined, yes.

23 MR. HARRIS: I want to talk about the status of
24 that SB 34 process. Is that process complete?

25 MR. FLINT: There are three things that are still

1 being worked on that are being worked on as part of SB 34.

2 One of them would be establishing the fees, which
3 this fee table is just a part of that. There are other
4 things that are being taken into consideration related to
5 SB 34. For instance, this fee table doesn't deal with a
6 five percent cap that's in SB 34 or potentially refunding
7 money for overpayment, which are things that are
8 continuing to be discussed as part of that process.

9 Secondly, under SB 34, there is an interim
10 mitigation strategy that's required and that has been out
11 in public draft, but it's being revised right now.

12 And a third part of SB 34 provides for an
13 advanced mitigation pathway whereby the State Legislature
14 provided money for the advanced purchase of land that can
15 then be credited as basically a land bank to different
16 projects. And currently no land have been purchased
17 through that process yet. So that's technically
18 unavailable until lands are purchased.

19 That's three things that are going on under SB
20 34.

21 MR. HARRIS: Let's take them in reverse order
22 then. The advanced mitigation path, there's \$10 million
23 is that, correct, in SB 34?

24 MR. FLINT: That's correct.

25 MR. HARRIS: And that money is to be used to

1 acquire lands to create a bank -- go ahead and describe it
2 if you would.

3 MR. FLINT: So the idea behind that section of SB
4 34 was to provide the Department of Fish and Game some
5 funding to buy habitat lands in advance before any of the
6 projects are approved; identifying, buying lands that
7 would work that will be suitable habitat. For instance,
8 desert tortoise and other species being impacted by the
9 projects.

10 The idea behind SB 34 was to provide certainty
11 for developers in their mitigation. So that approach
12 would be the most certain. The land would be bought in
13 advance. We'd know the acquisition costs. And if someone
14 wanted to take advantage of using that land to mitigate
15 their project, they could reimburse the cost of the
16 acquisition.

17 We would also have the management costs of that
18 land worked out, because we have -- without identifying
19 land, the land would already be identified as
20 mitigation -- the long term management costs worked out so
21 that would be there to know the exact cost to the
22 endowment.

23 MR. HARRIS: Is there a provision for adding that
24 \$10 million, or is that just a one time?

25 MR. FLINT: It was in the statute. It was a

1 one-time deal that was set up as a pilot program to test
2 out this process.

3 MR. HARRIS: So there's \$10 million available.
4 And that's staff's --

5 MS. HOLMES: I'm going to object to this line of
6 questioning, unless Mr. Harris can show how it's relevant
7 to this program. This witness has testified that there
8 hasn't been any land purchased. So --

9 MR. HARRIS: It's my next question. I'll try to
10 tie it together.

11 HEARING OFFICER KRAMER: Go ahead.

12 MR. HARRIS: So assuming this money had been
13 spent and this land had been purchased, what percentage of
14 the Ivanpah project would that entire program fund?

15 MR. FLINT: Well, just a rough -- I mean, a rough
16 estimate, the land prices in the areas of some of the
17 projects, if we would assume \$1,000 per acre that are on
18 here, then \$10 million would have purchased about 10,000
19 acres.

20 And that would be again depending on the species
21 and the ultimate permit requirements that come out of any
22 approvals. We could after -- at that point, we could
23 figure out how much could be considered or not considered
24 to work. It would depend on the species that are on the
25 property. All the species may not be mitigated on the --

1 may or may not be represented. And many on this property
2 and also waters of the state may not be fully mitigable.
3 So you may have to do a combination of other things.

4 But at \$1,000 an acre, it would provide about
5 10,000 acres. And for different projects and for most
6 projects, that's close to the size of their mitigation or
7 so. Maybe one or two projects at the most.

8 MR. HARRIS: Staff's filing of 7/30/10 has a
9 number of about \$25 million for the Ivanpah project. So
10 with ten million available, by my math, that's about 40
11 percent of our obligation. But I'd like to give you an
12 opportunity to explain why that 40 percent number is
13 wrong, if I'm wrong.

14 MS. BELENKY: I'm having trouble with the
15 relevancy right now.

16 MR. HARRIS: We have a condition that has \$25
17 million in it. We have a program that's set up for \$10
18 million. I'm asking about the relationship between those
19 two things.

20 MS. HOLMES: Why don't you ask Ms. Sanders to
21 explain the relationship then. I think that would be
22 perfectly appropriate.

23 MR. HARRIS: I thought they were a panel.

24 MS. HOLMES: They are. But Susan wrote the
25 conditions. Scott didn't write the conditions.

1 And I think we've had a partial answer with
2 respect to Mr. Flint talking about the fact that you can't
3 really tell much of anything until you know what species
4 are present and what the land looks like.

5 But Susan, can you explain -- I believe there is
6 language in the -- if this is like all the other solar
7 projects I've worked on, there's language that explains
8 what an applicant would need to do in order to take
9 advantage of an in-lieu-of-fee program. I believe there's
10 specific language regarding asking the Commission for a
11 determination that the proposal is consistent with CEQA
12 and CESA. That may not be this one.

13 Perhaps it would be something that would be
14 appropriate -- I'm sure that the other Commissioners and
15 Hearing Officers who have participated on the other solar
16 projects are familiar with it.

17 MR. FLINT: Can I -- just for clarification, I
18 need to add, I don't -- I'm not looking right at the page
19 that you're talking about for the total obligation. But
20 what we've just talked about here with SB 34 and with
21 respect to \$10 million is only the land -- the acquisition
22 portion of any mitigation requirements.

23 MR. HARRIS: So if you have vetted yourself to
24 that bank or that program, you'd have to pay, in addition
25 to the ten million for land, additional cost; is that

1 wrong? Is that right?

2 MR. FLINT: Yeah. There still may be cost
3 associated with any management activities on BLM lands
4 that would be part of the mitigation solution. And it
5 would still be the management endowment to be calculated
6 and added onto that. The ten million was for all
7 acquisition.

8 MR. HARRIS: Other things we're trying to get at
9 here is whether the program is available to us. It sounds
10 like we might use up most of the funds for that entire
11 program. So I was asking the question.

12 So I want to move off this. I didn't intend to
13 spend nearly as much time. I just want to make people
14 aware there was only \$10 million available statewide for
15 this entire program.

16 I want to talk about the REAT program, again
17 direct prodigy, if you will, of SB 34. A lot of the solar
18 folks, including LSA, we work with a large scale -- we
19 were involved in the development of SB 34, and one of the
20 things that was very important to them in development of
21 SB 34 was the voluntary nature of that program.

22 And, you know, actually, I'm going to point you
23 to -- just for the record, I'll point to the record. SB
24 34 actually talks about this program being a voluntary
25 program. And that was an important thing for the

1 industry. This is section of the legislation 2099 --
2 looks like it is B3. And it says, just to refresh your
3 memory, "The fund shall serve and be managed as an
4 optional voluntary method for developers or owners of
5 eligible projects and deposit funds," and it continues on.

6 So the SB 34 program, if from the developer point
7 of view, is completely voluntary. And so far we haven't
8 volunteered for that program.

9 So is it your position that notwithstanding the
10 voluntary nature of SB 34 that you can still be imposing
11 an SB 34 obligation on a non-volunteering entity?

12 MR. FLINT: I'm assuming that in that question --
13 well, I have to make an assumption in that question that
14 you're asking about using the cost table for non SB 34 --
15 someone not participating in SB 34.

16 MR. HARRIS: Go ahead and answer that if you can.

17 MR. FLINT: I didn't mean to change the question.
18 It wasn't clear.

19 MR. HARRIS: I guess let me back up. Let me
20 rephrase the question. See if that helps, Scott.

21 SB 34 is a voluntary program. And from the
22 developer perspective, that was a very important thing.
23 To date, we have not volunteered to participate in that
24 program.

25 Is it the staff's position that notwithstanding

1 the lack of volunteering, if that's the right word, by an
2 applicant that you can impose SB 34 obligations on us
3 without us agreeing to that voluntarily?

4 MS. SANDERS: Let me give you some background as
5 to what we, staff, were instructed to do with this
6 information.

7 We were given this and told and we weren't -- SB
8 34 was not part of the equation. We were said this is a
9 security estimate that will work. If, for example, you
10 build your project and then halfway through things don't
11 work, we need to purchase mitigation lands. We need a
12 reliable estimate of how much money it would cost us or
13 whoever was charged with doing it to actually make a
14 successful purchase.

15 And we needed to -- because we needed to know
16 that our mitigation measure truly mitigated, that the
17 money we allocated for security was adequate to do the
18 mitigation that was specified. So this is not joined at
19 the hip with SB 34. This is the guidance we got -- all
20 staff got for all their projects this is the right
21 security to use.

22 MR. HARRIS: So if there wasn't a REAT process
23 and there wasn't an SB 34, then your testimony is your
24 conditions would look exactly like they look today?

25 MS. SANDERS: I think the REAT team was working

1 on -- the REAT team developed the NFWF NMOU. They've been
2 working at our request and everyone's request. We need to
3 have some confidence that the numbers we're putting out
4 there as security is adequate to capture all the costs.

5 So there are land experts at BLM, at Fish and
6 Game, and all these agencies.

7 Scott, you're the one that did that. I think you
8 guys all pooled your knowledge and came up with a table
9 that captured all the costs that truly would be required
10 to fulfill the mitigation if you weren't available to do
11 it. SB 34 aside, that's what's in the table.

12 MR. FLINT: Yeah. As I said when I first started
13 speaking here, although you were putting this -- we were
14 putting this table together, the REAT was putting this
15 table together for multiple purposes. And regardless of
16 whether it's SB 34 or whatever or NFWF funds or whatever
17 or any method where the State would take responsibility
18 for fulfilling some of or all of the mitigation
19 obligation, this table should work.

20 It's not really tied to NFWF or anything.
21 It's -- each category is in this table -- this fee table
22 that you see here are based on years of data primarily
23 coming from BLM land acquisitions related to the
24 transaction and then our field staff -- our field staff's
25 experience and expertise in dealing with land prices in

1 different parts of the desert. Although -- although you
2 see one number here in land prices do vary, the idea of
3 this particular -- for instance, land acquisition having a
4 \$1,000 per acre estimate, here again, it was to be used
5 either for security purposes so that the obligations would
6 be secured through a letter of credit somehow or so the
7 project can proceed in a timely fashion once they receive
8 their permits. So either a letter of credit with the
9 applicant pursuing mitigation on its own, but appropriate
10 costs to this table would work.

11 If it was payment in NFWF or something, then this
12 is the amount that we would recommend be deposited with
13 NFWF to ensure that we can complete the mitigations and
14 fully mitigate the project. So either way, it should
15 work. It really wasn't tied to SB 34 directly. And it
16 works for different situations.

17 MR. HARRIS: Okay. I'm going to go ahead and
18 move on. I think we understand my concern about the
19 voluntary nature of that program.

20 I want to go back to where the program is though.
21 You filed -- you, staff -- again, anybody on the panel can
22 answer, including John. Doesn't mean to direct those
23 things just to Scott.

24 But staff filed on 7/30 a document that is the
25 REAT formula with cost allocation. Were you aware that

1 7/30 was also the day that comments were due on the draft
2 REAT program?

3 MR. FLINT: Is your question directed to me? No.

4 MR. HARRIS: The panel, whoever, can answer the
5 question.

6 MS. SANDERS: I wasn't aware.

7 MR. HARRIS: John, were you aware?

8 MR. KESSLER: No.

9 MR. HARRIS: Has there been a new iteration of
10 the draft REAT document since the 7/30 version of that
11 document came out from the REAT team?

12 MS. SANDERS: I don't think anyone has seen that,
13 if there is such a thing. That was one of the changes
14 that we made since the July 30th filing was that, should
15 there be an update, you could use the -- would use the
16 most current update.

17 MR. HARRIS: You see this sort of as a living
18 condition that would change based upon whatever the REAT
19 puts out next?

20 MS. SANDERS: That's not the impression I have.

21 Scott, maybe you can answer better.

22 I think this reflected a lot of thought and
23 research. I don't think it's going to change a whole lot.
24 But maybe you can add some to that, Scott.

25 MR. FLINT: Jeff, if you're -- are you referring

1 to the IMS? That was the document --

2 MR. HARRIS: No.

3 MR. FLINT: -- the comment was due on --

4 MR. HARRIS: No, it was due on the cost formulas.

5 MR. FLINT: We continue to work -- the REAT
6 continues to work through issues around phasing payment,
7 refunding overpayment, different issues like that that
8 we're trying -- we're working through to try to facilitate
9 again assisting and moving the mitigation fast on these
10 projects. But to date in those discussions, this table
11 has not changed.

12 MR. HARRIS: And you all are expecting that there
13 will be another iteration from the REAT, which is why
14 you're putting the condition language in there; is that
15 correct?

16 MS. SANDERS: I'm not expecting anything. I just
17 want there to be an easy way for you to update without
18 getting an amendment.

19 MR. HARRIS: So given that SB 34 is voluntary, if
20 we don't opt in now, can we opt in later when REAT finally
21 produces something --

22 MS. HOLMES: I'm going to object. That's way
23 beyond the scope of what this testimony is about.

24 MR. HARRIS: Let me ask you then, is the
25 condition written such that -- thank you, Caryn. See, sit

1 next to me.

2 Is the condition written such that someone who
3 doesn't immediately opt into the voluntary program finally
4 sees something -- they think there is a benefit there, I
5 want to opt in now; will the condition allow them to do
6 that later?

7 MS. SANDERS: I think it's more of a lawyer
8 question than a biologist question. I don't know of
9 anything in this condition or anywhere that precludes you
10 from participating in SB 34.

11 So maybe lawyers have different answers to that
12 question. I don't know.

13 MR. HARRIS: I guess I'll put it -- would you
14 oppose revising the language to allow us to opt in if we
15 decide to opt in later?

16 MS. HOLMES: The reference that I gave earlier is
17 to Conditions of Certification that are found in the other
18 large solar projects.

19 And I apologize I've only been looking at Ivanpah
20 filings for two days.

21 In many of the other large solar cases, there is
22 a Condition of Certification that has gone back and forth
23 as to whether it stands alone or in one of the conditions
24 that requires the acquisition. But it says that a project
25 proponent can take advantage of an in-lieu-fee program by

1 asking the Commission to make a finding sufficient for the
2 Commission to make CEQA and CESA finding that are required
3 by law. And they wouldn't have an objection to having
4 that language included in the case either.

5 MS. SANDERS: That would be fine.

6 MR. HARRIS: Thank you.

7 I think my next sets of questions you may have
8 addressed in your latest revisions, but I guess when we'll
9 see the document, we'll know.

10 MS. HOLMES: We'll find out.

11 MR. HARRIS: Some of the conditions had approval
12 language that said submit -- whatever it is -- raven plan
13 for approval to the CPM, the BLM's authorized
14 representative, CDFG, and the U.S. Fish and Wildlife
15 Service. Have those all been corrected now to say --

16 MS. SANDERS: If we didn't, it was an oversight.
17 We wanted to clarify that it was CPM making a decision in
18 consultation. Unless it was otherwise precluded. We
19 don't make decisions about any biological opinion.

20 MR. HARRIS: Your intent would be review and
21 approval by the CEC and BLM, review and comment by the --

22 MS. SANDERS: That is the intent, yes.

23 MR. HARRIS: I think we're on the same page
24 there. That wipes out a whole series of questions.

25 I want to go to Bio 17. It looks like we've

1 corrected the acreage now. The PMPD had 4073, which is
2 the old configuration before the M3. Let's take it
3 easier. It's your intent to have those reflect the actual
4 acreage of the project now as revised?

5 MS. SANDERS: 3,582, or the area disturbed by the
6 final project footprint in case there's tweaks to the
7 footprint.

8 MR. HARRIS: That's very good.

9 HEARING OFFICER KRAMER: Let me ask then on that
10 point, will that appear in your recommendation?

11 MS. HOLMES: Yes.

12 HEARING OFFICER KRAMER: Okay. And on the
13 earlier point of adding the opt-in provision, Mr. Harris,
14 are you asking that they give you that?

15 MR. HARRIS: Yes.

16 HEARING OFFICER KRAMER: So will that be added to
17 your comments?

18 MS. HOLMES: It will. It's not in the current
19 draft. That means we probably won't get it out this
20 afternoon, but we will add that language.

21 HEARING OFFICER KRAMER: Okay. Thank you.

22 MR. HARRIS: We spent a lot of time this morning
23 talking about translocation and the service biological
24 opinion, the e-mail including things like 50 miles' worth
25 of desert tortoise fencing. You put that into the

1 condition of Bio 17; is that correct?

2 MS. SANDERS: That's correct.

3 MR. HARRIS: So if it were to come out of the
4 biological opinion, at the end of the day, would it come
5 out of your condition as well?

6 MS. SANDERS: What you do you mean by "come out"?

7 MR. HARRIS: If the intervenors prevail upon the
8 agencies not to translocate but only to relocate over the
9 fence as we proposed, that 50 miles of fencing, as I
10 understand it, a lot of that is associated with the
11 translocation plan. So it wouldn't be --

12 MS. SANDERS: No. Let's clarify.

13 And Brian, you're here to clarify even more.

14 But the fencing associated with the translocation
15 is not -- is not part of the 50 miles of fencing. They're
16 separate. The fencing requires an avoidance measure.
17 It's minimization measure. The fencing associated with
18 the BLM mitigation is on top of that.

19 Brian, am I correct?

20 MR. CROFT: Yes. With the translocation plan
21 where you put them across the fence, the Highway 15
22 fencing that is proposed is primarily to prevent tortoises
23 from making long distance movement after they're
24 translocated and then being killed on the highway.

25 And so if we end up moving -- changing the

1 translocation strategy and moving these animals to a
2 different location, you'd still have the requirement to
3 fence roads that have the potential to be a mortality
4 source for those translocated animals.

5 So, I mean, after you move tortoises, they can
6 move long distances after relief. And there's some
7 potential they're going to be moving onto those highways.
8 So there's definitely some of the fencing associated with
9 the translocation. It's a measure to avoid or minimize
10 take associated with the translocation.

11 MR. HARRIS: So is it your intent to have the
12 language of Bio 17 parallel to language of the biological
13 opinion? Is that what you're trying to do with some of
14 the language?

15 MS. SANDERS: No. The intent was to be
16 consistent with BLM's mitigation measure, because their
17 one-to-one is part of our three-to-one.

18 I think I don't know what the -- I think the
19 biological opinion -- you can tell me, Brian, does it
20 reflect what we have in the revised condition and in the
21 EIS with respect to the fencing and route restoration?

22 MR. CROFT: In terms of how we described the
23 compensation for the project?

24 MS. SANDERS: Right.

25 MR. CROFT: Yeah. It does describe fencing and

1 route restoration in the draft that we have under review
2 right now.

3 MR. HARRIS: So if that draft were to change, the
4 biological opinion were to change where it is today, are
5 you amenable to having the condition change to reflect
6 that change in the biological opinion?

7 MS. SANDERS: I'm not sure what you're asking me.
8 If the biological opinion changes, I would change my
9 condition?

10 MR. HARRIS: Yeah.

11 MS. SANDERS: The condition requires compliance
12 with the terms of the biological opinion and all the
13 avoidance and minimization measures.

14 Ask it again in a different way.

15 MR. HARRIS: Actually, I think it's Bio 9. I
16 would assume that all the biological opinion requirements
17 are imposed in the state through Bio 9.

18 MS. SANDERS: It's a different condition. I
19 think it's Bio -- it's the Bio 7. It's one of those sort
20 of generic ones where just stake the berm must include all
21 measures from federal and State, includes the biological
22 opinion.

23 MR. HARRIS: All right. I guess what I was
24 trying to get you to say was if the Service drastically
25 changed their approach in the next 30 days in their final

1 biological opinion that you would be looking to conform
2 any inconsistency between those two documents, between the
3 biological opinion and your conditions; is that correct?

4 MS. SANDERS: I don't think that's needed. The
5 way Bio 9 is written, the translocation plan, you're going
6 to accommodate the most recent Fish and Wildlife Service
7 guidance. We have a measure in there requiring compliance
8 with the BO. So I'm not sure what changes the BO would
9 make that would prompt a change in our staff assessment.

10 MR. HARRIS: Okay. I'll let it go.

11 HEARING OFFICER KRAMER: Mr. Harris, let me be
12 clear though. You were talking specifically about a
13 fence; right? Was that just simply an example?

14 MR. HARRIS: My concern is this, Hearing Officer
15 Kramer, is that we have an idea what the final biological
16 opinion will look like, this e-mail that's been docketed,
17 but we don't have a final. And what I want to make sure
18 is there aren't inconsistencies -- that the staff isn't
19 composing mitigation measures thinking they have to do
20 this because it's in the biological opinion and then have
21 the final biological opinion something different and we
22 get both mitigation measures.

23 MS. HOLMES: The Bio 9 doesn't include any
24 special requirements.

25 MS. SANDERS: I'm not worried about that.

1 MR. DE YOUNG: One additional clarification.

2 The original biological opinion that was April
3 had us moving tortoise to the west side of the project and
4 fencing Interstate 15 along a Caltrans right-of-way.

5 With the new biological opinion, if it's
6 implemented, it takes away that requirement to fence I-15.

7 And what we're looking at is truly the need to be
8 able to meet our deadlines. And to meet our deadlines,
9 you have to back up on schedule and determine when you
10 need to be out in the field to start installing fencing
11 and certainly working with Caltrans. It's going to take
12 time to do that. So at this point, we're looking at two
13 possibilities for biological opinion that may or may not
14 require additional activities.

15 MS. BELENKY: Can I ask a clarifying question?

16 First, you said there is a biological opinion.
17 My understanding, there's a draft --

18 MR. DE YOUNG: There's a draft.

19 MS. BELENKY: And the second thing is I think
20 Brian Croft just stated that it would be needed to be
21 fenced in either case.

22 MR. DE YOUNG: Let's specifically ask Brian that
23 question.

24 MS. BELENKY: Let's ask Brian.

25 MR. CROFT: In terms of the BO and what we would

1 require for the translocation, we see highway fencing as a
2 needed thing to minimize take of tortoises due to the
3 translocation. So if we move the tortoises west of
4 I-15 -- I mean west of the project site, you would need to
5 fence I-15 to prevent road mortality of translocated
6 tortoises.

7 If we move the tortoises to a different location
8 to a different translocation area, then the fencing of
9 highways in the area around that translocation area would
10 be required to minimize the take associated with long
11 distance movements of translocated tortoises. So the
12 fencing requirement is going to be, you know, the same
13 either way. It's just a matter of which you're going to
14 be fencing.

15 MR. DE YOUNG: I understand that.

16 And the point is -- and this is being able to hit
17 the ground and get this project constructed to meet ARRA,
18 that we're in a situation right now looking at
19 potentially two completely different scenarios that we
20 need to be working on now to make those viable for the
21 project to move tortoise this fall and for the project to
22 survive.

23 MS. HOLMES: I believe the staff's Conditions of
24 Certification accommodate either possibility.

25 And I think Ms. Sanders testified there is a

1 Condition of Certification that you think would be
2 important to change to capture that. Please point it out
3 to us, because we're not aware of it.

4 MR. HARRIS: I'll be specific. I think Bio 9
5 does exactly what you said, Caryn. I think we've covered
6 whatever is in the biological is admitted through Bio 9.

7 My concern is: Are we then in addition to doing
8 that, you know, redundantly placing those things into Bio
9 17 and creating the possibility of inconsistency? That's
10 the whole reason for this line of questioning. If the
11 biological opinion is not as everybody thinks it's going
12 to be, are we going to end up with obligations in Bio 17
13 that are not in the biological opinion?

14 MS. HOLMES: Well, to the extent that that
15 condition could be interpreted that way, I don't think
16 staff has a problem with making sure that what we're
17 saying is that we want to be consistent with whatever
18 biological opinion the U.S. Fish and Wildlife Service
19 ultimately approves. So if there is specific language
20 that needs to change, it's not clear to me. If you -- if
21 there is specific changes that needs to change that other
22 condition, we would be happy to do that.

23 HEARING OFFICER KRAMER: Is it fair to say staff
24 does not intend to impose any additional requirements
25 beyond those that are in the biological opinion?

1 MS. HOLMES: Well, yes. In fact, staff does.
2 Staff is imposing three-to-one ratio, whereas the
3 biological opinion reflects a one-to-one ratio. There are
4 minimization --

5 HEARING OFFICER KRAMER: But the fencing would
6 not be?

7 MS. HOLMES: In terms of fencing.

8 MS. SANDERS: Let's be clear about the fencing.
9 The 50 miles, which is the mitigation, and aside and apart
10 from that is the fencing that's needed to avoid the
11 translocation tortoise wondering onto the roadway. Does
12 that get to your question? I see nothing incompatible in
13 what we have in our mitigation --

14 MR. DE YOUNG: The difference is where you fence
15 and when you fence and keeping the project -- having the
16 project have the ability to move tortoise this year.

17 MS. SANDERS: I see your dilemma, and I
18 sympathize. I don't know that there's anything that we
19 can change in this condition or that we can do to help you
20 with that. That's a function of the biological opinion
21 process.

22 MR. DE YOUNG: We have to have one.

23 MS. BELENKY: Can I ask another clarifying
24 question?

25 My understanding is -- and from reading the final

1 EIS is that the translocation would be partly to the west
2 and partly long distance. So that is what the final EIS
3 states. So you are positing a third idea that would be
4 different that would be all long distance translocation;
5 is that correct?

6 MR. HARRIS: No.

7 MR. CROFT: No. The translocation strategy would
8 be moving any tortoise that's within 500 meters of the
9 western boundary fence of the project site. Those would
10 be placed over the fence. And then the remaining
11 tortoises from Phase I and Phase 2 and the construction
12 logistics area would involve a long distance
13 translocation.

14 MS. BELENKY: So just to follow up. So wouldn't
15 I-15 --

16 MR. DE YOUNG: Site 3. What happens in Site 3,
17 Brian?

18 MR. CROFT: In Site 3, the remaining tortoises
19 would go into the exclusion zone that's been set up on the
20 north side of phase three.

21 MS. BELENKY: And if tortoises are moved as you
22 called it over the fence to the west, would they -- would
23 I-15 need to be tortoise fenced in order to protect those
24 tortoises?

25 MR. CROFT: We're not anticipating that tortoises

1 move those short distance. They're going to make the same
2 sorts of long distance movements as the long distance
3 translocation just based on some of the translocation work
4 that's been done at Fort Irwin and some other studies
5 looking at these shorter distance translocation.

6 MS. BELENKY: Thank you for clarifying.

7 MR. HARRIS: I wanted to ask a couple questions
8 about the security in Bio 17. There had been a number of
9 20 million I think in there before. Is there a number in
10 what you're going to be publishing today or tomorrow?

11 MS. SANDERS: Yes. There's two numbers.

12 One, if you chose to do it yourself, the security
13 if you don't go through NFWF, that's 24,556,482.

14 If you go through NFWF, there is additional fees
15 required because of their expenses. And that fee total is
16 twenty-five thousand, one-hundred twenty-seven million,
17 420.

18 MS. HOLMES: Do you want to restate that number?

19 MR. HARRIS: You said --

20 MS. HOLMES: You said thousand followed by
21 million.

22 MS. SANDERS: Sorry. 25,127,420; is that
23 correct?

24 MS. HOLMES: That's much better.

25 MR. HARRIS: In the last version of this, the 329

1 versus, I think you had a 25 percent cap. But you've
2 removed that now with the REAT formula; is that correct?

3 MS. SANDERS: Part of the reason for having that
4 was because at the time we came up with that security, we
5 knew there was efforts underway to create a more
6 consistent comprehensive security estimate. We want to
7 provide some assurances that -- because in response to
8 your concern, that it was so open-ended. Now it's not
9 very open-ended anymore. It's pretty fixed. So there's
10 no need to provide that kind of assurance.

11 MR. HARRIS: Maybe we're talking past each other,
12 because the changes I see, you went from 20 million with a
13 25 percent cap to 25 million and no cap. That's
14 certainty, but for certainty dead with the higher number
15 and no cap. Was it staff's intent to remove that cap?

16 MS. SANDERS: That was staff's intent, yes.

17 MR. HARRIS: Scott, you mentioned something about
18 a five percent ceiling in SB 34. Would that come into
19 play here?

20 MR. FLINT: I don't -- I don't know how that is
21 going to be worked out for that portion of SB 34. I'm no
22 longer working on that in my new position. So I can't add
23 much for that part.

24 MR. HARRIS: Can we volunteer to take a five
25 percent cap? Sorry. Okay.

1 MR. FLINT: Where's the off button?

2 MR. HARRIS: I raise these very serious issues
3 for the company, the open-ended nature of this condition
4 now and the fact that as a start-up company we are going
5 to have to put cash down. So \$25 million cash, open-ended
6 obligation, I think the project is probably dead.

7 MR. DE YOUNG: Plus federal.

8 MR. HARRIS: Plus 12 million federal money.
9 We're talking about coming up with 30 million just for
10 desert tortoise -- \$37 million in cash. So we're very
11 interested in working with you on a security formula
12 that's not 100 percent of a huge number.

13 Are you amenable to something more like a
14 percentage? Say a ten percent down on a number initially
15 as opposed to requiring the entire 37 million right out of
16 the gate?

17 MS. SANDERS: You're asking me that question?

18 That's not something that I would decide. We
19 were given guidance to apply this, and that is what we
20 did.

21 MR. HARRIS: So who do I ask that question of
22 then, Caryn?

23 MS. HOLMES: What I can tell you is that there
24 have been requests in other proceedings that are not as
25 far along as yours to consider phasing that has to do with

1 phasing of construction and tying the phasing of security
2 to construction. And there have been a number of
3 workshops held.

4 It sounds simple. We found that in reality it's
5 pretty difficult to put in place. There is a workshop
6 going on across the atrium right now on this issue for the
7 Calico project, because it turns out it's fairly
8 challenging to determine how much land is actually
9 effected from, for example, fencing. You could fence --
10 the fence could cover ten acres, but you could have
11 affected a thousand. So we've held workshops in several
12 cases to try to come up with phasing approaches.

13 I believe the only case in which that's been
14 completed is the Blythe case. I believe the other case
15 staff is still working on it. As I said, those cases are
16 further back than you are. So I don't know what it means
17 timing wise.

18 MR. HARRIS: Well, please understand that in our
19 comments we're going to suggest some kind of a number that
20 won't kill the project. I like the word "phasing." We
21 can call it that.

22 Also understand we have a BLM bonding obligation
23 that's in addition to the \$25 million, 12 million federal,
24 plus another BLM bond obligation to restore the property
25 to its pre-conditions. So -- and that is actually a bond

1 as opposed to a full cash thing. So maybe the model there
2 wouldn't be bad.

3 MS. HOLMES: To our way of thinking, the security
4 is different than the bonds since it has to do with
5 security for mitigation measures that would be
6 implemented. That's different from what needs to happen
7 upon projects closure. And that the general concept is
8 simply that we always have enough money in security to
9 ensure that the mitigation that would be required to fully
10 mitigate for the impacts that have occurred at that level
11 of construction would be covered.

12 MR. HARRIS: Caryn, don't you have the ability --
13 if somebody wasn't meeting their obligation for
14 acquisition, don't you have the ability under the
15 conditions just to shut them down?

16 MS. HOLMES: As you know, we think it's much
17 better to ensure that we have the money to make sure that
18 the mitigation is carried out. That's much more certain
19 for the protected species in their habitats.

20 MS. SMITH: Shutting them down doesn't help to do
21 anything for the harm that's already occurred.

22 MR. HARRIS: Good answers. Don't agree with
23 them, but they're good answers.

24 Bio 17, we got a lot of problems with Bio 17. I
25 urge the Committee to try to read Bio 17 and figure out

1 how that condition would work from a project financing
2 perspective. I believe it's five to seven pages long. We
3 think it's pretty unwieldy, unmanageable, and we're going
4 to try to figure out a way to clarify some of this and do
5 it in a spirit that captures some of the staff's issues.
6 But right now, it makes the project largely unfinancable.

7 And I would urge you to sit down with this
8 condition and try to take a piece of paper and draw a map
9 and figure out how it's implemented, because it's made me
10 pull out whatever hair I had left on top of my head. It
11 really is -- it's the longest condition I've ever seen.
12 And I don't know how -- the good thing, may be hard to
13 find noncompliance. We can't figure out how it's
14 implemented.

15 HEARING OFFICER KRAMER: How is this effected by
16 the federal permitting process, if at all? In other
17 words, are the feds going to require some of the same --

18 MR. DE YOUNG: Yes.

19 HEARING OFFICER KRAMER: So to what extent do we
20 have wiggle room?

21 MR. DE YOUNG: It's a matter of how much money
22 the company can come up with prior to the start of the
23 construction. And the way we look at it right now, that
24 obligation, if it stays the way it is, is nearly \$40
25 million.

1 HEARING OFFICER KRAMER: Okay. I was thinking
2 more about the -- I gather Mr. Harris was commenting on
3 the unwieldiness of the procedures and some other things;
4 it wasn't purely the money. You did say financing in the
5 same sentence. I guess that could have been money.

6 MR. HARRIS: It's both things. I think the money
7 kills the project, if you can find the money. I'm not
8 sure how I would implement this condition. And I really
9 typically don't challenge the Committee, but I challenge
10 you to take out a piece of paper and map this thing out.

11 MR. DE YOUNG: To clarify what I'm saying, the
12 word that's financial requirement comes in after financing
13 in a phased approach, it works for the project. But
14 having to come up with \$60 million prior financing, the
15 project couldn't be financed. The company simply can't do
16 that.

17 MR. HARRIS: Just one loose end.

18 Raven plans, \$105 an acre. So another \$350,000
19 mitigation or something like that. Can you explain to me
20 how that program works?

21 MS. SANDERS: What we're going to be submitting,
22 in addition to the staff comments this afternoon and
23 tomorrow, is a description of which I believe has been
24 filed in other proceedings and is available describing how
25 they come up with the cost estimate and the methods for

1 applying it. And I did not develop it, so I cannot
2 explain it.

3 Brian, I know you didn't develop it either, but
4 you might know more about it. Can you offer more
5 explanation?

6 MR. CROFT: It's all in that write-up that you're
7 speaking of. I can't really explain it off the top of my
8 head. I wasn't involved in the development of the number.

9 MS. SANDERS: It basically gets to -- sorry,
10 Brian. Go ahead.

11 MR. CROFT: But the funds would be used, as you
12 said before, to implement regional raven management to try
13 and address some of the potential raven increases that are
14 not -- that we're not able to deal with just through
15 site-specific measures.

16 MR. HARRIS: Is this a true in-lieu-fee program
17 where you pay the check and then whoever is managing the
18 program manages the program, or is this -- so there's no
19 way to control a plan we have to implement? We just write
20 a check and we're done?

21 MS. SANDERS: No. You still need to implement
22 your on-site mitigation measure to make sure you're not
23 providing subsidies, food or substrate. On top of that,
24 this is a regional approach this gets to those things that
25 you can't really tackle on a project-by-project basis.

1 MR. HARRIS: So it's everything that is required
2 before, plus the fee. So there's no relief for applicants
3 of any of their obligation. Just the fee.

4 HEARING OFFICER KRAMER: Did you answer?

5 MS. SANDERS: Yes. That's right.

6 MR. HARRIS: Thank you.

7 I think I'm losing everybody, including myself.

8 So just quickly to 21, the bats and the avian
9 issues. In the verification language, it starts off no
10 less than 30 days prior to construction. We know it's a
11 short time frame, because if we're going to be in
12 construction in 30 days would not be enough time to do
13 that. So either a phased approach or --

14 MS. SANDERS: Sure. That would be fine. I agree
15 it's a complex plan and one that would require more time
16 than 30 days.

17 MR. HARRIS: So maybe we phase it ten days --

18 HEARING OFFICER KRAMER: I think you said less
19 than 30 days.

20 MR. HARRIS: Less than 30 days for the
21 submission.

22 MS. SANDERS: What are you asking?

23 MR. HARRIS: Sorry. We want to be able to start
24 construction. And we worried 30 days may be too long.
25 Can you live with a shorter time frame than 30 days?

1 MS. SANDERS: Yes.

2 MR. HARRIS: Thank you very much. That took way
3 longer than it should have. I apologize. Thank you.

4 HEARING OFFICER KRAMER: Okay. That will take
5 care -- any redirect, Ms. Holmes?

6 MS. HOLMES: I just have some questions for Mr.
7 Brian, who's last name I've now forgot. Croft.

8

9 REDIRECT EXAMINATION

10 MS. HOLMES: Mr. Croft, there was some questions
11 earlier this afternoon from the Center for Biological
12 Diversity about whether or not there had been a specific
13 study on moving desert tortoise from this site to the
14 Mojave National Preserve.

15 Can you provide just some background information
16 on how you determined whether or not it's okay to move
17 tortoises from one area to another? For example, do you
18 look at the density estimates at the host site? Do you
19 look at what the capacity is or how many more tortoises
20 could be moved? Can you kind of explain how you go
21 through that process?

22 MR. CROFT: Well, the desert tortoise
23 translocation guidance that's come out has set some
24 density threshold on what the post-translocation density
25 can be. So the applicant, before they translocate

1 anything into the translocation area, need to be out and
2 do surveys of the resident population to determine what
3 the current density is. And then they're not allowed to
4 translocate more tortoises than the density threshold will
5 allow.

6 So if they end up with -- if they identify a
7 4,000 acre translocation area and it turns out that their
8 pre-translocation surveys indicate that they're going to
9 need a larger area to meet that threshold -- density
10 threshold requirements, then we would have to potentially
11 expand their translocation area.

12 Based on what we are estimating in terms of the
13 numbers of tortoises that would come off of the Ivanpah
14 site and the potential densities in the Ivanpah Valley, we
15 think that the areas that are identified would be large
16 enough, but you're not going to know for certain until
17 those pre-translocation surveys are done.

18 And then, you know, in terms of determining
19 whether or not it's okay to do translocation, I mean, we
20 look at other past studies that have been done on
21 translocation. We look at the mortality rates that were
22 observed in some of those studies. And you know, there's
23 a lot of information out there. I mean, there's been a
24 lot of studies on translocation. There's still a lot we
25 don't know. But there is a lot of information to go off

1 of and the public literature.

2 MS. HOLMES: Thank you. Those are all my
3 questions.

4 HEARING OFFICER KRAMER: Okay. We have one
5 question for the panel.

6 In your original analysis, you concluded that the
7 impacts to desert tortoise were mitigated to insignificant
8 levels and want to ask if your conclusion has changed by
9 virtue of the additional evidence that's come in since
10 that time about tortoise mortality from translocation?

11 MS. SANDERS: No, it's not changed. We already
12 analyzed and assumed there would be considerable
13 mortality -- or possibility of mortality with
14 translocation. No, there's been no change in our
15 conclusions.

16 HEARING OFFICER KRAMER: Is there a mortality
17 level at which your conclusion might change?

18 MS. SANDERS: You consider those translocated
19 tortoises as essentially lost as far as a reproductive
20 population. You're mitigating for the fact that that area
21 is no longer going to be producing tortoises. You're not
22 counting on those translocated tortoises as bolstering the
23 population. So I don't think there is necessarily a
24 number.

25 I think you get to a point where -- and this is

1 something for the Service to answer -- I think you get to
2 a point where it doesn't meet the standards of Endangered
3 Species Act, whatever. But it does not change my
4 conclusions as far as mitigating the impact of the
5 project.

6 HEARING OFFICER KRAMER: The Endangered Species
7 Act is for somebody else to opine about.

8 MS. SANDERS: In the biological opinion, the
9 draft that we've already seen, I think there was a ten
10 percent -- Brian, correct me if I'm wrong -- ten percent
11 you would determine if adaptive management measures are
12 needed; is that correct?

13 MR. CROFT: There's two different thresholds that
14 we're identifying in the biological opinion. There's a
15 ten percent threshold -- ten percent mortality that is
16 established at a point where the applicant needs to come
17 back and talk to the Service about potential adaptive
18 management measures and possibly the need to reinitiate
19 consultation.

20 In addition, the applicant is also going to have
21 to transmit and monitor the resident population and a
22 control population that's separated from a translocation
23 area. And they're going to be looking at difference in
24 mortality rates and mortality sources to the different
25 populations so that we can have some gauge of

1 effectiveness and have some sense of whether or not the
2 mortality rates that we're seeing are actually caused by
3 the translocation itself.

4 And if we do see statistically significant
5 differences in those mortality rates, then the applicant
6 would have to reinitiate consultation, which would mean
7 since the translocation would occur in phases, there would
8 be an opportunity to sort of take a step back. If we
9 start to see things off the first phase and the
10 construction logistics area translocation that sort of
11 indicates that we're seeing mortality rates that are above
12 what we really anticipated, then there is a potential to
13 sort of check that and reinitiate consultation before the
14 second phase is translocated.

15 So those are the two thresholds that we are sort
16 of looking at and trying to tie it in as much as possible
17 into effectiveness monitoring and the requirements that
18 we're imposing for that.

19 But we definitely do anticipate some level of
20 mortality based upon the studies we've reviewed. We
21 anticipate there's probably going to be around 30 percent
22 mortality at the translocated population. It's just a
23 matter of whether -- it's a matter of how much of that is
24 actually associated with the translocation itself versus
25 natural mortality in the Ivanpah valley. And so that's

1 sort of why we are doing this intensive monitoring and
2 looking at control populations so we can make those sorts
3 of comparisons.

4 HEARING OFFICER KRAMER: Okay. Thank you.

5 Any other parties had additional witnesses?

6 We've already covered Mr. Cashen.

7 Was there anything else from the Sierra Club?

8 MS. SMITH: No. No direct.

9 MR. HARRIS: Mr. Kramer, were we going to talk
10 about plants as well?

11 HEARING OFFICER KRAMER: Oh.

12 COMMISSIONER BYRON: Before you finish this
13 panel, I have one quick question.

14 HEARING OFFICER KRAMER: Go ahead.

15 COMMISSIONER BYRON: As I understand,
16 Ms. Sanders, Bio 21 is a new Condition of Certification.
17 Can you give me a sense of what the basis for that
18 addition is?

19 MS. SANDERS: In the staff assessment, we
20 discussed the only study that's been conducted on the
21 issue of mortality associated with this kind of facility.
22 It's the McQuerry study. And the conclusion we came to
23 that it was not likely we would be seeing that kind of
24 mortality because, in part, the conclusions of that study
25 was that the nearby ponds and agriculture fields are

1 responsible for some of the birds that were found. But
2 staff acknowledged both the assessment and in rebuttal
3 testimony I think maybe even a briefing that there is a
4 lot of uncertainty.

5 So when BLM produced -- and we were aware that --
6 didn't think it was a threat ranked high enough to impose
7 a mitigation measure. When BLM prepared a mitigation
8 measure, we wanted to have maximum consistency. And it
9 sort of resolved the uncertainty -- although it's an extra
10 burden for the applicant to conduct these studies, it
11 resolved the uncertainty and would cover any potential
12 impacts to birds. So it felt good to do it, even though
13 we didn't necessarily think it was warranted at the
14 beginning. A lack of information.

15 COMMISSIONER BYRON: It's consistent we can --

16 HEARING OFFICER KRAMER: Off the record for a
17 minute.

18 (Off the record.)

19 HEARING OFFICER KRAMER: Back on the record.

20 COMMISSIONER BYRON: No further questions. Thank
21 you very much.

22 MS. SANDERS: Were the questions finished? Did
23 you have more questions?

24 HEARING OFFICER KRAMER: No. We're done with
25 that. So let's see.

1 Sierra Club did not have additional witnesses.

2 The Center for Biological Diversity?

3 MS. BELENKY: Yes. Ileene Anderson is here and
4 we submitted written testimony as well.

5 COMMISSIONER BYRON: Off the record.

6 (Off the record)

7 HEARING OFFICER KRAMER: Back on the record.

8 So go ahead, Ms. Belenky.

9

10 DIRECT EXAMINATION

11 MS. BELENKY: Yes. Ms. Anderson, you were
12 previously sworn in this matter; is that correct?

13 MS. ANDERSON: Yes.

14 MS. BELENKY: And could you summarize just for
15 the Commission today your written testimony that you
16 provided?

17 MS. ANDERSON: I'd be happy to.

18 My written testimony is with regards to the
19 current proposal to -- one of the issues is translocating
20 desert tortoise into the Mojave National Preserve, which
21 is recognized as a desert wildlife management area.
22 Current recovery plan does not recommend translocating
23 desert tortoise into DWMAs until translocation is better
24 understood.

25 Relocations are still not well understood, and

1 we're still having significant mortality associated with
2 them. Even though the desert tortoise will be disease
3 tested and the disease tortoises pulled out and not
4 translocated, the data from Exhibit 949 of ours, Gowan and
5 Berry, does identify that even though tortoises were
6 tested to be disease free, once they were rechecked
7 subsequent to the translocation, they hadn't developed
8 disease.

9 Also, there appears in the literature to be a
10 suggestion that even within the northern Mojave Recovery
11 Unit, which is where the project site is located, that
12 there is genetic differences between the desert tortoises
13 that are occurring on the proposed project site and the
14 possible relocation site within the Mojave National
15 Preserve.

16 And then lastly, on that issue, in my discussion
17 with the Mojave National Preserve folks last Friday
18 afternoon -- and I'm hoping that Debra Hughson is still on
19 the telephone. She had indicated there had been no
20 decision to actually be the recipient site for the
21 translocated tortoises.

22 So I just feel that this -- it's confusing for me
23 as to figure out exactly what's going on, because there's
24 so many problems with this potential translocation.

25 Then a second point in my testimony was with

1 regards to a newly issued report by the Independent
2 Science Advisors for the Desert Renewable Energy
3 Conservation Plan. And in that report, which is draft --
4 but they will be finalizing soon -- they basically
5 recommend against translocating any animals, including
6 desert tortoise.

7 A third point was with regards to the desert
8 tortoises that are proposed to be -- I think dropped over
9 the fence is the current term that we're using -- and that
10 will be relocated to the west side of the project site.
11 And in my reading of the proposal, the notion for moving
12 these tortoises is to move them out of harm's way.

13 But as the cumulative section of the staff
14 assessment and the BLM final EIS identifies that that area
15 is actually proposed to have a high-speed train go
16 through. So not seeing how that actually moves tortoises
17 out of harm's way or achieves the goal of not having to
18 move the tortoises twice, my suggestion would be to
19 safeguard those lands with higher conservation.

20 MS. BELENKY: I'd like to ask a few clarifying
21 questions. Let's start with the end part.

22 Are you concerned about what was stated here
23 today that there might not be any fencing on the I-15?

24 MS. ANDERSON: I am, with regards to literature
25 shows us that actually 500 meters is outside of home

1 range, even for male tortoises. They tend to have larger
2 home ranges than females. And so the tortoises are going
3 to try to move back to their home site. And the notion is
4 there's fencing there, et cetera. They could actually
5 potentially move towards the freeway, and hopefully not,
6 but possibly onto the freeway.

7 MS. BELENKY: So in your opinion, if any
8 tortoises are moved out of the area where they're found,
9 they may still wander. Is that your understanding of the
10 science on this issue?

11 MS. ANDERSON: Yes, that's my understanding from
12 the literature.

13 MS. BELENKY: In the western area where these
14 tortoises or some number of them may be moved, are there
15 any other threats in that area that would also concern
16 you?

17 MS. ANDERSON: Well, certainly there is a grazing
18 allotment in that area and there's plenty of data that
19 show that cows and tortoises don't do well together. So
20 increasing the number of tortoises in an area from moving
21 them over there could put them in harm's way as well.

22 MS. BELENKY: Thank you.

23 I just want to ask a couple questions about the
24 documents that we submitted.

25 In your earlier testimony on March 22nd at

1 hearing before this Committee, we provided exhibit that
2 was Number 942, which I believe is the abstract from the
3 Desert Tortoise Symposium that occurred on February 27th
4 both of this year in 2010. Can you discuss that abstract
5 and how you came to provide it to the Committee?

6 MS. ANDERSON: Sure.

7 MR. HARRIS: Sorry. What number is this?

8 MS. BELENKY: 942, which was provided on March
9 22nd. This goes to your questions about the newer
10 information.

11 MR. HARRIS: So we're going backwards now to
12 previous exhibit?

13 MS. BELENKY: The Exhibit 942 is an abstract of a
14 paper -- I'm going to let Ms. Anderson explain.

15 MR. HARRIS: I'm going to object, unless I
16 first -- I'd like have to have a copy of the exhibit. It
17 wasn't part of what you sent. So can you --

18 MS. BELENKY: Exhibit 942. I will go back and
19 restate the question.

20 Exhibit 942 was provided to the Committee and to
21 all of the parties for the March 22nd hearing. It is an
22 abstract of a paper provided by Gowan and Berry at the
23 Desert Tortoise Council Symposium on February 27th of this
24 year. Can you describe briefly --

25 MR. HARRIS: Can you provide me with a copy of

1 that document?

2 MS. BELENKY: I didn't bring an extra copy. I'm
3 sorry. I can e-mail you a copy right now.

4 MR. HARRIS: I'm going to object on the basis I
5 have a copy of the document before us --

6 MS. BELENKY: You have been provided a copy of
7 the document.

8 MR. HARRIS: And that part of the record is
9 closed. So I'd like at least to have a copy of the
10 document to know where you're going.

11 I remember something about this abstract bothered
12 me at the time. I'm not remembering what it was. So do
13 you have a copy that I could have?

14 MS. BELENKY: I'm sorry, I do not have a paper
15 copy.

16 I would ask that the Committee allow me to
17 continue this line of questioning.

18 MR. HARRIS: Why don't you e-mail me an
19 electronic copy, and we can defer this then so I can look
20 at it.

21 HEARING OFFICER KRAMER: What's your offer of
22 proof? Are you simply trying to draw a connection between
23 Exhibit 942 and this newer report, which is -- I suppose
24 is what was abstracted?

25 MS. BELENKY: Yes.

1 HEARING OFFICER KRAMER: 942 is currently
2 described as additional testimony of Ms. Anderson's.
3 So --

4 MS. BELENKY: That was her testimony.

5 HEARING OFFICER KRAMER: That was part of her --

6 MS. BELENKY: And Exhibit 945 -- I'm sorry. 945
7 was the abstract from the Desert Tortoise Symposium.

8 MR. HARRIS: As I recall, this is a document that
9 we could never get a copy of the paper. The abstract was
10 on the website. It's an abstract of a paper. And we
11 asked you for a copy of the paper, and you never gave us
12 the paper.

13 MS. BELENKY: I would like to allow Ms. Anderson
14 to respond to that.

15 MR. HARRIS: I'm going to continue to object.

16 HEARING OFFICER KRAMER: The objection is
17 overruled.

18 MR. HARRIS: She has a paper. Can she e-mail it
19 to me at least?

20 MS. BELENKY: I'm going to.

21 MS. ANDERSON: So originally the issue with this
22 paper is a -- and the abstract is some of the first data
23 that was actually published, if you will, on the
24 translocation success at Fort Irwin after the second year.
25 The Desert Tortoise Counsel Symposium in February of last

1 year the abstracts were submitted by everyone who was
2 speaking. They wrote papers associated with those
3 abstracts. And because it was a synopsis of the data that
4 Gowan and Berry had collected and analyzed, that was all
5 that's found in the literature in the most recent efforts
6 for the translocation on Fort Irwin. So we submitted
7 that.

8 Subsequent to that, we have had ongoing FOIAs to
9 Department of Interior. And in July, we actually received
10 a paper copy of their report that supports that abstract,
11 which is what we included with my latest testimony as
12 Exhibit 949.

13 MS. BELENKY: Thank you.

14 So I just want to clarify for the Committee, the
15 document that we submitted as 949, which is a progress
16 report for 2009, which is authored by Timothy Gowan and
17 Kristine Berry, is the report that they were discussing at
18 the Desert Tortoise Symposium but had not yet been issued
19 at this time; is that correct?

20 MS. ANDERSON: Yes. That's correct.

21 MS. BELENKY: Thank you.

22 HEARING OFFICER KRAMER: I'll note that Exhibit
23 949 appears to be the same document as Exhibit 613.

24 MS. ANDERSON: There's more information in 949.
25 It's not just the abstract. It's all of the data.

1 HEARING OFFICER KRAMER: No. The Sierra Club
2 submitted the same document on their own.

3 MS. BELENKY: And I did point out to all the
4 parties and the Committee, we did actually provide our
5 Freedom of Information Act letter that came with this
6 report. We got this report in July of this year.

7 MS. SMITH: Mr. Harris had asked us to submit
8 proof. We submitted a FOIA request, and it was complied
9 within the last couple weeks.

10 HEARING OFFICER KRAMER: I'll note Exhibit 949
11 has an extra page in the back, which is a transmittal
12 letter from USGS to Ms. Belenky, a CD Rom of I guess this
13 document and others. So since 949 is slightly more
14 complete -- we don't like to have duplicates -- we will go
15 with that one and remove 613.

16 MR. HARRIS: What was the document number? Was
17 it 945?

18 MS. BELENKY: 945.

19 MR. HARRIS: I'd have some cross on that then.

20 HEARING OFFICER KRAMER: So that establishes the
21 whereabouts or the wherefores of Exhibit 949. What was it
22 about this document that required a Freedom of Information
23 Act Request? You can keep that as a rhetorical question.

24 MS. BELENKY: I don't think it's exactly
25 rhetorical. These are what they call the gray literature.

1 It's not published in a journal or so forth. This is
2 reports that are within the different agencies. And in
3 order to acquire these reports from BLM or Fish and
4 Wildlife Service or in this case the United States
5 Geological Surveys, which actually sponsors a lot of the
6 scientific work on the desert tortoise, you do usually
7 need to do a Freedom of Information Act Request.

8 HEARING OFFICER KRAMER: Do you have more
9 testimony from Ms. Anderson?

10 MS. BELENKY: Let me just check on the other
11 exhibits.

12 I just have one other question.

13 Ms. Anderson, Exhibit 950, which is a report from
14 Hagerty and Tracy regarding the genetic structure of the
15 Mojave desert tortoise, can you explain why you didn't
16 provide that in your earlier testimony?

17 MS. ANDERSON: Yes. I didn't include it in my
18 earlier testimony, because the tortoises were not to be
19 moved into the Mojave National Preserve at that time and
20 now they are.

21 MS. BELENKY: And this document specifically you
22 are referring to to show a difference between the
23 populations; is that correct?

24 MS. ANDERSON: Yes. That paper basically shows
25 that there's some genetic differences between the proposed

1 project site and the genetics of the tortoises on the
2 Mojave National Preserve.

3 MS. BELENKY: Thank you.

4 HEARING OFFICER KRAMER: Isn't mixing of
5 different gene pools normally considered a good thing?

6 MS. ANDERSON: It can be beneficial. But the
7 notion is you also don't want to introduce genetic
8 material that may not -- that may -- if the genes are
9 working right in one place, you don't want to dilute those
10 genes by introducing others that may not work so well in
11 that same region. Does that make sense?

12 HEARING OFFICER KRAMER: But is there any real
13 knowledge about whether one of the gene pools or another
14 is less optimized for a particular environment?

15 MS. ANDERSON: Not to my knowledge there hasn't
16 been those kinds of experiments.

17 HEARING OFFICER KRAMER: So that's probably a
18 speculative concern then would be fair to call it?

19 MS. ANDERSON: Possibly.

20 COMMISSIONER BOYD: This may surprise you, but I
21 actually read this and a lot of other stuff last night
22 which I found was very repetitive, because each of you
23 were submitting copies of the same thing. But I thought I
24 read in that the author saying they had a very difficult
25 time discerning genetic differences between a large body

1 of desert tortoises.

2 MS. ANDERSON: A large body?

3 COMMISSIONER BOYD: Meaning, they struggle to
4 find differences in desert tortoises in a wide area of the
5 desert. And I don't know how -- to what extremes they had
6 to go to get this genetic difference. I mean, I began
7 to -- I don't remember anymore, you know, but think of all
8 this non-mixing of gene pool stuff myself as I read this
9 last night. I thought -- it was late and I was weary.
10 But anyway, I came away with that. You might want to
11 correct me.

12 MS. ANDERSON: Well, certainly with regards to
13 the genetics of the different recovery units, I think
14 that's been fairly well studied and identified in the
15 literature. Now what scientists are honing down on is
16 sort of what's going on within those different recovery
17 units and how closely related are they or not.

18 And so I think it's just important to be
19 conservative in how we're translocating tortoises around
20 on the landscape, because of the difference in the
21 genetics. And even a small difference -- I mean, when
22 you're talking about genetics of any organism, there is an
23 extensive amount of genetic material in there. And what
24 they're looking at is certain parts of the genetic
25 material and looking for differences within that. And

1 it's whether or not they're targeting the right thing and
2 to look for those differences.

3 HEARING OFFICER KRAMER: Was that it for direct
4 testimony?

5 MS. BELENKY: Yes. Thank you.

6 HEARING OFFICER KRAMER: Okay. Cross-examination
7 from staff?

8 MS. HOLMES: No.

9 HEARING OFFICER KRAMER: None from staff.

10 Any other intervenor, including those on the
11 telephone?

12 Mr. Harris.

13 MR. HARRIS: Thank you.

14

15 CROSS-EXAMINATION

16 MR. HARRIS: Back to 945, do you have a copy in
17 front of you? Then from your recollection, Exhibit 945
18 you're referring to the Gowan and Berry abstract on pages
19 14 and 15 of that document; is that correct?

20 MS. ANDERSON: Yes. That's what I recall.

21 MR. HARRIS: And you set out a lot of figures
22 about the death of translocated tortoise. Do you recall
23 that?

24 MS. ANDERSON: Yes.

25 MR. HARRIS: According to that abstract, what's

1 the primary cause of death of translocated tortoises?

2 MS. ANDERSON: Predation.

3 MR. HARRIS: Predation, thank you.

4 Is that a final result product or a preliminary
5 results product.

6 MS. ANDERSON: I have a -- I would imagine that's
7 preliminary results, because the studies are ongoing. The
8 translocation is two-and-a-half years old and the goal is
9 to find out ultimately mortality and survival of
10 tortoises.

11 MR. HARRIS: Sorry. You talk about Fort Irwin in
12 your testimony. So you're familiar with the translocation
13 at Fort Irwin; is that correct?

14 MS. ANDERSON: Yes.

15 MR. HARRIS: Before we get to that, do you
16 distinguish between translocation and relocation?

17 MS. ANDERSON: Yes, I do.

18 MR. HARRIS: What's that distinction in your
19 mind?

20 MS. ANDERSON: Well, there is a number of
21 different definitions of it, and I think it depends in the
22 context of which you're speaking.

23 I believe that the Fish and Wildlife Service
24 identifies it as 500 meters. Anything that a tortoise is
25 not moved over 500 meters is relocation. And any tortoise

1 moved over 500 meters is a translocation.

2 I tend to disagree with that because of the home
3 ranges of tortoise where 500 meters you could move a
4 tortoise outside of its home range. In my opinion,
5 relocation is simply moving a tortoise within its own home
6 range. Translocation would be moving a tortoise outside
7 of its home range.

8 MR. HARRIS: Thank you. That's very clear.
9 Appreciate that.

10 So let's go back to Fort Irwin. Was that a
11 relocation or a translocation at Fort Irwin?

12 MS. ANDERSON: Both.

13 MR. HARRIS: Both.

14 MS. ANDERSON: In everyone's definition.

15 MR. HARRIS: So there were some tortoise that
16 were only moved less than 500 meters?

17 MS. ANDERSON: Yes.

18 MR. HARRIS: There were tortoise moved more than
19 500 meters?

20 MS. ANDERSON: Yes.

21 MR. HARRIS: How about more than ten miles?

22 MS. ANDERSON: Ten miles, I'm not sure any of
23 them were moved that far.

24 MR. HARRIS: Would you would be surprised to
25 learn that some of those tortoise were moved over 100

1 miles?

2 MS. ANDERSON: Yes.

3 MR. HARRIS: That would be news to you.

4 And you are familiar with Fort Irwin?

5 MS. ANDERSON: Yes.

6 MR. HARRIS: How many desert tortoise were
7 involved at Fort Irwin?

8 MS. ANDERSON: Well, the numbers were never
9 actually clear, despite a number of FOIAs that we did.
10 Initially, the notion was 770 and it's declined from
11 there. Getting a firm number has been literally
12 impossible.

13 MR. HARRIS: So in your estimate, how many of
14 that 700 were translocated?

15 MS. ANDERSON: I can't answer that. I don't
16 know.

17 MR. HARRIS: No idea. Where were the tortoise
18 moved? Were they moved to area with a similar habitat?

19 MS. ANDERSON: Some of them were, especially the
20 ones that were put over the fence. Some of them were
21 moved into areas that were very different.

22 MR. HARRIS: Were the ones that were moved
23 several hundred or more than a hundred miles put into
24 similar habitat?

25 MS. ANDERSON: None were moved over a 100 miles,

1 I'm sure of that.

2 MR. HARRIS: Okay. If that's testimony, I'll
3 accept it.

4 What about elevation? Were they placed in
5 similar elevations?

6 MS. ANDERSON: My recollection is that they were
7 placed within the same elevations that tortoise are known
8 to exist at within a geographical area adjacent to Fort
9 Irwin.

10 MR. HARRIS: Were tortoise from one elevation
11 moved to a similar elevation?

12 MS. ANDERSON: That -- I don't know the details.

13 MR. HARRIS: That's it. Thank you.

14 HEARING OFFICER KRAMER: Any redirect?

15 MS. BELENKY: I don't think so at this time.

16 Thank you.

17 HEARING OFFICER KRAMER: Thank you.

18 Mr. Suba, any testimony?

19 MR. SUBA: Actually, I have questions on plants.

20 HEARING OFFICER KRAMER: Mr. Harris, were you
21 also holding onto some plant questions?

22 MR. HARRIS: We would like to discuss Bio 18,
23 yes.

24 MR. SUBA: But there's also folks on the phone.
25 I don't know if they have questions for tortoise.

1 HEARING OFFICER KRAMER: For Ms. Anderson?

2 MR. SUBA: Yeah.

3 MR. SUBA: I don't know.

4 HEARING OFFICER KRAMER: Did anyone on the phone
5 have questions for Ms. Anderson?

6 MR. CONNOR: Mr. Kramer, I don't have any
7 questions for Ms. Anderson.

8 HEARING OFFICER KRAMER: Mr. Suba, you have no
9 testimony at this point; right? Or just questions?

10 MR. SUBA: Well, I provided testimony. I did. I
11 provided testimony, and I can go over the points what I
12 submitted today.

13 HEARING OFFICER KRAMER: Okay. Because -- first
14 of all, does anybody wish for Mr. Suba to summarize his
15 testimony? On the telephone or in the room?

16 MS. HOLMES: I'd just like to point out that
17 staff's only proposing one change to Bio 18. That's to
18 remove the androstephium -- if I pronounced that
19 correctly -- misidentification. So all other changes that
20 staff proposed were the subject of the hearing in March.
21 And so I don't know the extent to which the Commission
22 wants -- the Committee wants to hear this additional
23 testimony.

24 I guess staff would move that cross-examination
25 of staff witnesses at least be limited to the change the

1 staff has proposed since the last hearing. We don't have
2 an objection to other parties putting their testimony on.

3 HEARING OFFICER KRAMER: Mr. Suba, what's the
4 nature of your question?

5 MR. SUBA: To clarify the measures in Bio 18 as
6 they pertain to the summer/fall plants that might occur
7 there.

8 MS. HOLMES: We haven't changed our testimony on
9 that point. That could have been addressed and I believe
10 was addressed at the March hearing.

11 HEARING OFFICER KRAMER: Well, he can certainly
12 make a comment.

13 MS. HOLMES: You asked him about the nature of
14 his questions. I'm referring to cross-examination of
15 staff. I'm not referring to cross-examination of anything
16 other than the removal of the androstephium.

17 HEARING OFFICER KRAMER: So Mr. Suba, if you can
18 state your concern.

19 MR. SUBA: Thank you. I'm trying to reconstruct
20 the chronology of all this. And perhaps you can help me.

21 MS. HOLMES: I have a list that was provided to
22 me that indicates that the only change to staff's Bio 18
23 since the last hearing is the removal of androstephium
24 from the list and the use of the REAT table, which that's
25 a change that's been discussed -- there was a -- staff

1 filed changes on March 16th. There was a hearing on the
2 22nd. The only changes to those conditions is the removal
3 of the androstephium and that -- as you heard earlier
4 testimony today, changes to reflect the updates to the
5 REAT table.

6 I'm going to object to any cross-examination that
7 goes beyond those two changes. And I think we already had
8 cross-examination on the REAT table.

9 COMMISSIONER BYRON: I think Ms. Homes just like
10 repeating androstephium.

11 MS. HOLMES: Androstephium.

12 HEARING OFFICER KRAMER: To Mr. Suba, what's the
13 nature of your concern? And I think you could, for
14 instance, put it in the form of a question for staff about
15 whether they would agree to a particular change, for
16 instance.

17 MR. SUBA: It's not a change that's not anything
18 new that isn't I think in there within the intention of
19 the current Bio 18 from July 30th. I just want to clarify
20 that is what is actually intended.

21 There are surveys that are to be done for any
22 potential summer or fall flowering plants. And it says
23 that in here. I don't have a problem with that.

24 But the question that -- the clarification that I
25 needed was that those plants respond to the capricious

1 behavior of nature. The rains, they come up. If it
2 doesn't rain, they don't come up. So if it doesn't rain,
3 is it one time? One and done, and there are no more fall
4 surveys? Because the measures in Bio 18 are consistent in
5 calling for the spring plants and the spring surveys.

6 But the fall surveys, talking specifically in the
7 special status plant protection and mitigation areas, the
8 set-aside areas, the 476 acres, the 250 feet set-asides,
9 whatever parameters and the 150 feet on other side.

10 Let's say going out there this year there hasn't
11 been any rain. Chances are, this area is not going to
12 come up. Is there other -- well, actually, since March,
13 other projects have developed their own botanical
14 requirements that recognize the fact that plants come up
15 in response to rain in the summer and fall. And so they
16 sort of provide stipulations on when those surveys should
17 be done. But this one doesn't.

18 So I'm wondering if there is a way to provide
19 consistency among the projects that are going forward.
20 And what's missing here is some clarification on when
21 we're looking for summer and fall plants in those
22 set-aside areas. Is it just 2010, which, it hasn't
23 rained? Or during the course of the ten years of surveys
24 that you're going to be doing for the spring plants? Is
25 there an opportunity to provide fall surveys that respond

1 to when it rains to see if special status plants come up
2 from those set-aside areas?

3 I'm thinking specifically of Imperial Valley
4 solar that has something along those lines for Bio 19 and
5 their project.

6 So you know, that's my question to staff: Is
7 there an intention to keep looking for fall surveys --
8 keep looking for summer and fall plants in response to
9 rains since that's the appropriate time to do them?

10 MS. MILLIRON: When we initially envisioned the
11 surveys for fall, the ones you're talking about, it was to
12 set the boundaries in protection areas to avoid any --
13 obviously, it's not going to be straight lines. So those
14 surveys would happen. You define where the -- you draw
15 the line of those protection areas. So if the time when
16 the applicant would be conducting those surveys would be
17 in a year of no rain, the intent wasn't to have them still
18 do surveys of an area that is going to be unsuccessful.

19 But it doesn't -- the condition doesn't deal for
20 what happens if there is no rain in that year. I mean, I
21 don't know that -- I don't think that the condition is
22 designed to pull the designation of those protection areas
23 up in that situation or hold up their project for that.
24 So I would be definitely be open to hearing some language
25 that you think might be better for that.

1 So maybe one suggestion is that if there is no
2 rain and there is just nothing there, that they don't
3 waste time on those surveys at that time. But when there
4 is that rain and it's late or something like that, then
5 they resume the surveys at that point. I would be open to
6 putting more specificity in there.

7 But I'm not familiar with the Imperial condition
8 that you mentioned. So I'm not familiar with how they're
9 dealing with those.

10 MR. SUBA: And I want to be a little bit careful
11 with direct analogy to Imperial, because the conditions
12 are different between the Colorado Sonoran area and what
13 we're talking about here.

14 And to be clear, if the recommendation of the
15 Committee is to certify the project, which is something
16 our organization doesn't agree with, doesn't think it's
17 the best thing, the appropriate decision, but if that's
18 the thing -- I'm not talking about holding up the project
19 until fall surveys are done. What I'm looking for is a
20 way to incorporate unknowns today into the future as the
21 project is going forward, if, in fact, it does do that.

22 MS. HOLMES: I think this issue was briefed. I
23 read over the briefs this morning in preparation for this
24 hearing. And I wasn't at the previous hearings, but I can
25 tell from the brief that the issue clearly was raised at

1 prior hearings and was fully briefed.

2 And the staff position was and remains that it as
3 always nice to have more information, but it's not
4 necessarily legally required to have more information.

5 We believe that we do have sufficient information
6 to move forward. If the applicant wants to work on a
7 modification so that you can address what happens if there
8 is limited rain the first year, we would be happy to
9 explore that option.

10 But we did an enormous amount of work with the
11 solar projects with the rare plant surveys, and I think
12 we're quite comfortable with what we've come up in those
13 cases. I don't think that we need to necessarily
14 replicate that here in order to be legally sufficient.

15 MR. HARRIS: I want to weigh in with what Caryn
16 just said. Misa is I think actually trying to be
17 accommodating, but we're not interested in changing this
18 condition. These issues were briefed and they've been
19 decided. And I don't why we're rehashing them today.

20 HEARING OFFICER KRAMER: Final thoughts, Mr.
21 Suba, on that one?

22 MR. SUBA: Well, one is for me to learn the
23 subtleties of briefs versus evidentiary hearing.

24 And the other is that the legal system and the
25 need to produce greenhouse gases and prevent and minimize

1 damage from climate change don't always fit into a nice
2 box. I mean, we're developing measures that have edges
3 and time frames and response to a natural situation that
4 doesn't have those things.

5 So the recent science report that came out for
6 the DRECP stresses the need to integrate new information
7 as projects go forward. And I've seen signs of this in
8 other projects. And now I'm looking for a little
9 consistency in this one.

10 HEARING OFFICER KRAMER: You're certainly free to
11 propose modification to the conditions in your comments.
12 But it doesn't sound like you're going to get a lot of
13 traction trying to work out modifications right now.

14 MR. SUBA: I heard that, but it's still my wish.

15 HEARING OFFICER KRAMER: Did you have anything
16 else?

17 MR. SUBA: No. That's all I had on Bio 18.

18 HEARING OFFICER KRAMER: I'm not sure I finished
19 asking if anybody wished to cross-examine Mr. Suba on the
20 testimony he offered for this hearing.

21 I'm seeing none, so we will not have him either
22 summarize it or take those questions.

23 MR. HARRIS: Was it testimony or comments he
24 provided?

25 HEARING OFFICER KRAMER: Remind me the -- it will

1 take me a moment to look them up. I should have set a
2 deadline, if simply for my own convenience.

3 MR. SUBA: This is an evidentiary hearing, and I
4 submitted testimony.

5 MR. HARRIS: At 9:15 today.

6 MR. SUBA: That's right.

7 HEARING OFFICER KRAMER: It was a single
8 document: Is that correct? I'm trying to recall.

9 MR. SUBA: Yes.

10 MR. HARRIS: Are you sticking around, Greg? Are
11 you staying until the bitter end?

12 MR. SUBA: Yeah.

13 MR. HARRIS: I haven't had a chance to look at
14 his testimony. I'll ask our experts to look at it in the
15 interim.

16 HEARING OFFICER KRAMER: It does seem to be more
17 in the nature of argument with quotation from the DRECP
18 science panel.

19 MR. SUBA: And in the interim --

20 HEARING OFFICER KRAMER: Is there any objection
21 to our accepting this as comment? Public comment as
22 opposed to testimony?

23 MR. SUBA: I prefer it as testimony.

24 HEARING OFFICER KRAMER: We'll come back to that
25 then.

1 Seems like a good time to take a break let's try
2 for five minutes. Knowing that's Commission time, we will
3 start again in ten minutes.

4 (Thereupon a recess was taken.)

5 HEARING OFFICER KRAMER: We're going to go back
6 on.

7 The Committee had one -- we wanted to ask
8 questions similar to that that we asked of the staff. And
9 I think of the other witnesses, most of them as well of
10 the applicant's tortoise expert. And I understand he has
11 to leave fairly soon.

12 So Mr. Harris, if you can introduce him. I don't
13 recall if he's been sworn.

14 MR. HARRIS: Mark Cochran, he was sworn
15 previously and did testify.

16 HEARING OFFICER KRAMER: So Mr. Cochran, our
17 question is -- and then we'll have the other parties
18 follow up if they want.

19 The new information that's come out recently,
20 including the newly submitted reports today, are about
21 tortoise mortality from their relocation or
22 translocation -- I think the distinction is not important
23 to this question. How does that effect your expert
24 conclusion about whether there are significant impact or
25 not to tortoises from their being moved off the site?

1 MR. COCHRAN: It doesn't influence my opinion as
2 to the significance of the impact.

3 And just a little background, I mean, the impact,
4 to me, is -- I mean, the major impact is the acres. You
5 know, the area of habitat that is altered, you know, the
6 for the long term. That's the primary impact. And then
7 there's the impact the tortoises that are being displaced.
8 Okay.

9 And then in terms of the tortoises being
10 displaced, I mean, in a lot of ways the Service and others
11 look at those as taken tortoises. They've already lost
12 their habitat. And so that being the case, what is the
13 best disposition for those displaced tortoises? I mean --
14 and as we've been discussing, there's a lot of options.
15 Any time they're moved to another location, short or
16 long -- in my opinion, better short -- there is the
17 potential for further impacts: Impact to the tortoises
18 that are moved, displaced; impacts to the resident
19 tortoises, et cetera et cetera.

20 But I mean, the alternative is to euthanize them
21 or not return them to the wild. And so my opinion is, you
22 know -- I mean, if they're disease free, if you can
23 verify -- the agencies are trying to do that, you're not
24 going to adversely effect the resident population, the
25 best thing is to attempt to move them. I mean, that's the

1 best you can do. And recognizing that there is a good
2 chance that a lot of them will die, still, in my opinion,
3 they're worth the effort relative to the alternatives.

4 Does that answer the question?

5 HEARING OFFICER KRAMER: Yes. Thank you.

6 Well, one more. Then what is it in your mind
7 that provides the mitigation for the loss of the habitat?

8 MR. COCHRAN: All the things we've been
9 discussing, you know: Land management actions, setting
10 certain other areas aside, you know, to preclude future
11 development.

12 You know, it's a tough question for me, because
13 in terms of wildlife management, you know ducks are pretty
14 easy. It's building ponds, putting out food. Other
15 species, manipulating the habitat.

16 For tortoise, the primary threats are they have
17 anthropogenic human effects. To the extent possible, you
18 try to limit those effects. You know weeds, invasive
19 species. I'm of a mixed mind on the fencing, because that
20 does further fragment habitat.

21 But, yeah, it's just a tough question that we've
22 all been wrestling with. What constitutes mitigation and
23 compensation.

24 But I do think that -- to my way of thinking, I
25 mean, I'm a proponent of relocation. Moving them a short

1 distance. I think if that's the case, there's less
2 potential for disease transfer, more likely they're going
3 to be in similar habitat.

4 To my way of thinking, given a tortoise can live
5 the same lifetime as a human, tremendous reproductive
6 potential, given that the numbers are probably declining,
7 the best thing is to do the attempt and that is to
8 relocate the animals and hope they survive and continue to
9 reproduce what is probably already a declining population.
10 So the tortoise is displaced; they have a valuable part of
11 that population.

12 HEARING OFFICER KRAMER: Thank you. Does anyone
13 else have any questions for this witness? On the
14 telephone?

15 MS. BELENKY: I just had one question.

16 HEARING OFFICER KRAMER: Ms. Belenky.

17 MS. BELENKY: I just -- I just want you to
18 clarify your testimony on this. You said an alternative
19 would be to euthanize the animals. Is it your
20 understanding that under the California ESA or the federal
21 ESA that would be allowable?

22 MR. COCHRAN: I would be happy if that was
23 stricken from the record. All I intended to point out was
24 that a good case could be made for not returning them to
25 the wild, in which case they wouldn't be euthanized -- I'm

1 sorry -- but they would be put in a concentrations camps
2 or interred for the rest of their life. And then may be
3 they would still have some other value.

4 But no, certainly no. Euthanizing displaced
5 tortoise is not something I would propose or would hope
6 anybody would propose.

7 MS. BELENKY: Thank you.

8 HEARING OFFICER KRAMER: Anyone on the telephone
9 have questions?

10 MR. EMMERICH: This is Kevin Emmerich for the
11 Basin and Range. I had a brief question.

12 And I'm not 100 percent sure who this should go
13 to. Maybe to the staff. Possibly Fish and Wildlife
14 Service and the applicant.

15 Were you all aware that there are surveys stakes
16 saying tortoise sent on the Ivanpah site right around the
17 Gates 12 Road. Seems to be defining the construction
18 lay-down area. Does anybody know when approval for this
19 was made?

20 MR. DE YOUNG: Can I address that?

21 HEARING OFFICER KRAMER: Mr. de Young, go ahead.

22 MR. DE YOUNG: Yes. We're certainly aware of
23 that. Mr. Hurshman is in the back of the room.

24 It's under the BLM casual use -- is that the
25 correct term, Tom?

1 MR. HURSHMAN: Yes.

2 MR. DE YOUNG: BLM casual use regulations
3 non-invasive activities, such as surveying on foot is
4 permitted. And that's what we're doing. We've done a
5 number of surveys out at the site. And we actually have
6 to have the survey from Mr. Hurshman so he can write his
7 right-of-way. That's why it's being done now.

8 Stakes are being put in the ground. But the
9 project has to go forward. Stakes can easily be removed.
10 Again, there's no -- there's no off-road vehicle use.
11 It's all on foot.

12 HEARING OFFICER KRAMER: Does anyone have any
13 more questions for the applicant's tortoise witness?
14 Okay. Thank you for coming.

15 MR. COCHRAN: Thank you.

16 HEARING OFFICER KRAMER: Back to where we were.
17 Mr. Suba had finished up, I believe.

18 MR. SUBA: Yes.

19 HEARING OFFICER KRAMER: And Dr. Connor, you had
20 some testimony?

21 DR. CONNOR: Yes, I'm here.

22 I submitted written testimony to all parties on
23 Friday, which I thought was the due date for comments, the
24 20th. I think many of the issues that I raised have been
25 covered in previous testimony today.

1 What I did do was point out the risks of
2 translocation that were identified in the 1994 recovery
3 plan. Those risks include the tendency of tortoises to
4 wander away when where they're released, make long
5 distance movements, increased predation, which we also
6 heard about today. Coyotes taking them.

7 There's also a strong potential for antagonistic
8 responses from resident tortoises to relocated tortoises.
9 And those antagonistic responses can result in long
10 distance movement, which is why I'm somewhat concerned
11 about this idea that if tortoises are simply moved,
12 relocated across the fenceline from the project site, that
13 there is no need to fence I-15. That makes no sense.
14 Tortoises are known to make long distance movements, even
15 when they're relocated. But also you can't guarantee that
16 you're not moving tortoises from outside their home range
17 and into another tortoise's home range. And the agnostic
18 interaction can result in tortoise moving off in long
19 distance. Not just male/male interaction, but also
20 female/female interactions.

21 I also noted that the recovery plan talks a lot
22 about the risk of the disease, which we should be
23 cognizant of that. There's also limitation on the ALISA.
24 I think we heard a little bit about that earlier in
25 January.

1 And then the fifth item was this concept of
2 genetic pollution. One of the things that we know is that
3 there are often tortoises in the Ivanpah Valley close to
4 the interstate that apparently are not the local sub-unit
5 type. This is identified by Dr. Hagerty in his Ph.D.
6 Thesis. A summary of that thesis is the paper that I
7 believe the Commissioner read last night, the Tracy and
8 Hagerty summary. Dr. Hagerty found that there's strong
9 isolation by distance, just like the Murphy paper that we
10 heard about back in January. That is the further apart
11 you are with the part of the habitat, the more dissimilar
12 the genetic makeup of the tortoises.

13 And generally speaking, when you're looking at a
14 small area, you're not going to find significant
15 differences between the tortoises in an area unless there
16 is a barrier. So tortoises on one side of the mountain
17 and the other side of the mountain may show genetic
18 difference. But generally speaking of a long valley, they
19 should be very similar.

20 And so my concern with the fact that some of
21 these tortoises have turned out to be the wrong sub-unit
22 suggest that these tortoise are in the wrong place either
23 because they've moved down the freeway of their own
24 volition or they've been moved and dumped.

25 And I'm really concerned that the latest proposal

1 which would translocate desert tortoises on the Mojave
2 National Preserve where most of California's northeastern
3 Mojave desert tortoises remain could potentially result in
4 this genetic pollution that was identified in the recovery
5 plan.

6 I'm also concerned to hear today that staff has
7 revised Condition of Certification Bio 17 again. Back in
8 January, in the rebuttal testimony, staff announced they
9 revised the Condition of Certification to specify BLM
10 habitat recovery action should occur within the
11 Northeastern Mojave Recovery Unit. That was basically to
12 satisfy the CESA requirements. And today we heard that's
13 in fact no longer the case.

14 So I am very concerned right now that the
15 mitigation proposal as it is now proposed is completely
16 inadequate to mitigate the impacts of the desert tortoise.

17 Thank you.

18 HEARING OFFICER KRAMER: Any questions from staff
19 or any of the intervenors for Dr. Connor?

20 MS. SANDERS: If I could clarify -- this is Susan
21 Sanders -- that a selection criteria for the compensation
22 lands have not changed. And those say there should be as
23 close as possible to the project site, so it goes on from
24 there.

25 The requirement for the recovery actions has

1 always been it occur within the northeastern Mojave
2 recovery. That's not a change. It's always been that the
3 acquisitions could be following these criteria.

4 So maybe I'm misunderstanding your question, but
5 are you saying we've changed the criteria for acquisition
6 lands?

7 DR. CONNOR: Yes. In January, you specified that
8 BLM habitat recover actions would occur within the
9 Northeastern Mojave Recovery Unit. That's in Exhibit 305.

10 MS. SANDERS: Recover actions will. That's what
11 BLM is going to be doing, just the recovery actions,
12 fencing --

13 DR. CONNOR: Acquisition and recovery actions.

14 MS. SANDERS: Well, Tom Hurshman is here to
15 answer, but I think all that's happening is
16 non-acquisition with these recovery actions. Those will
17 be happening in the Northeastern Mojave Recovery Unit.

18 DR. CONNOR: So there could be no habitat
19 acquisitions within the developings of the Mojave Recovery
20 Unit?

21 MS. SANDERS: According to the criteria, that
22 would be ideal, because the first criteria is as close as
23 possible to the project site. There aren't that many
24 opportunities for acquisition in that area, but that's the
25 goal certainly.

1 DR. CONNOR: So in January, you changed the
2 Conditions of Certification to specify acquisition with
3 the Northeastern Mojave Recovery Unit.

4 MS. SANDERS: That was to correct a mistake. As
5 you recall, we replicated what was in the NMOU, which
6 actually had the wrong recovery unit, because most of NMOU
7 is not in the Northeastern Mojave Recovery Unit. We did
8 make that correction that recovery action would occur in
9 the Northeastern Mojave Recovery Unit. But we never
10 changed the criteria for acquisition.

11 DR. CONNOR: The proposed conditions -- the
12 revised Conditions of Certification states, "to fully
13 mitigate for habitat loss and potential taking of desert
14 tortoise, BLM compensatory mitigation plan serving as
15 one-third of the three-to-one mitigation ratio required to
16 satisfy CESA would include acquisition up of up to 4,033
17 acre ares of land within the Northeastern Mojave Recovery
18 Unit, or desert tortoise habitat enhancement, or
19 rehabilitation activities that meet BLM, CDFG, Fish and
20 Wildlife, Energy Commission approval, or some combination
21 of the two."

22 MS. SANDERS: What are you reading from?

23 DR. CONNOR: Exhibit 305 the staff rebuttal
24 testimony, page 23.

25 MS. SANDERS: I don't have that in front of me.

1 I didn't think there had been any confusion about where
2 the criteria -- how they let out the criteria for
3 acquisition. It's been the same in the condition ever
4 since it was first written.

5 The change has been originally the one-third BLM
6 enhancement and mitigation was going to consist of a
7 combination of acquisition and recovery actions. Now it
8 is just recovery actions, is that -- Tom is nodding.

9 MR. HURSHMAN: That's correct.

10 MS. SANDERS: In that sense, I guess it has
11 perhaps shifted. I don't think there's anything
12 preventing acquisitions in the Northeastern Mojave
13 Recovery and that would be good. But it's not a
14 requirement of our selection criteria.

15 DR. CONNOR: And you still think that satisfied
16 the CEQA requirements?

17 MS. SANDERS: I do.

18 DR. CONNOR: Okay.

19 HEARING OFFICER KRAMER: Any other questions or
20 responses to Dr. Connor's testimony or comments -- I think
21 it's a combination of both -- before we get to the
22 applicant from any other party?

23 MS. BELENKY: I just had one question for Dr.
24 Connor. This is Lisa Belenky at the Center for Biological
25 Diversity.

1 Dr. Connor, I think that this was raised at
2 another hearing, but it's hard to remember exactly. But I
3 would like you to clarify.

4 My understanding is that there's been a lot of
5 talk about what date there could be actions taken to, for
6 example, take blood from tortoises or start moving
7 tortoises this fall. And there has been some confusion
8 about what date that would start. And I wondered if you
9 could just clarify what is the -- what do those dates
10 really signify and when is sort of the season, so to
11 speak, in the fall?

12 DR. CONNOR: If you look at the basic sort of
13 life history of a desert tortoise across the year, in
14 areas like the Ivanpah Valley, you tend to get two
15 activity seasons. You get a spring season. You get a
16 fall season. The summer is very hot there, of course.
17 And the tortoises tend to incubate during the summer. So
18 you have some activity in the spring. You have some
19 activity in the fall. The amount of time that tortoises
20 might be active in the spring or active in the fall
21 depends entirely not on the date but on the actual time.
22 If it's a very hot, dry fall, the tortoises are not going
23 to be up.

24 And as far as taking blood samples, of course,
25 you need to retrieve the animal to do that. If you happen

1 to dig them out of the ground, which obviously could
2 happen in a clearance survey, you can dig them out, take
3 the blood samples and then presumably store them somewhere
4 until you get the results of the blood samples. But if
5 it's animals that you need to -- you're going to leave in
6 situ and come back and retest the following spring, then
7 obviously you can't dig them up. But you do need to
8 retrieve the tortoises to take the blood sample. And the
9 tortoises do need to be active at this time. So simply
10 having a stated time that's simply a window at which it
11 might be possible to relieve the animal.

12 MS. BELENKY: Thank you.

13 DR. CONNOR: Does that answer your question?

14 MS. BELENKY: Yes. Thank you.

15 HEARING OFFICER KRAMER: Mr. Harris, did you have
16 questions?

17 MR. HARRIS: Just two quick ones.

18 Dr. Connor, we kicked around the term
19 "translocation" and "relocation" quite a bit. So it
20 sounds like from your testimony you are opposed to the
21 translocation plan for the Mojave Preserve; is that
22 correct?

23 DR. CONNOR: Oh, yes. Absolutely.

24 MR. HARRIS: So in your opinion, relocation is
25 the preferred as to translocation relocation?

1 DR. CONNOR: I'm not quite sure I appreciate the
2 difference between relocation and translocation. I think
3 it's really a semantic thing. If you're going to define
4 relocation as one thing, that's fine.

5 But basically any movement of desert tortoises is
6 problematic. For example, if you read the 1999 Desert
7 Tortoise Council guidelines for biologists working on
8 construction sites, they talk about moving tortoises. The
9 issue isn't so much translocation versus relocation; it's
10 whether or not you move these tortoises within their home
11 range.

12 And what's going on right now is that the Fish
13 and Wildlife Service is attempting to define a distance
14 which would essentially provide a good buffer in which you
15 would make sure that you're capturing the distribution of
16 disease across that area. That's all. So they basically
17 set a cut-off limit which you're moving tortoises over
18 this distance you must do an analysis. It's probably a
19 good idea to the always capture the microplasma, but Fish
20 and Wildlife Service is saying if you move them more than
21 500 meters you must do the test.

22 MR. HARRIS: Thank you. I have no more
23 questions.

24 HEARING OFFICER KRAMER: Okay. Thank you, Dr.
25 Connor.

1 Did I miss a party who wants to offer some
2 evidence?

3 MS. HOLMES: Staff has one clarification to offer
4 to a previous statement regarding the applicant's request
5 for a condition addressing the in-lieu-fee. And I'll just
6 have Ms. Sanders address that now.

7 HEARING OFFICER KRAMER: Please go ahead.

8 MS. SANDERS: We did actually include language
9 that specifically allows you to partake of SB 34 and Bio
10 17, which Caryn recognized and I had missed. And that's
11 in the July 30th file. It states that you're allowed to
12 have the option of doing that and there is a measure of
13 the verification. So that's in the July 30th. The last
14 paragraph on that condition before the certification.

15 MR. HARRIS: So -- I'm sorry. You said you're
16 allowed to do "that." Can you define what "that" is?

17 MS. HOLMES: Satisfy the mitigation obligation by
18 paying the fee.

19 We did add the language that I referenced as
20 being available for other projects to this project as
21 well. It's the same language that you would see if you
22 were to look at any of the other large solar projects.

23 MR. HARRIS: We have one clarification too on the
24 Bio issues, botany issues. Are we done with botany or can
25 I have Amy clarify?

1 HEARING OFFICER KRAMER: One more tortoise
2 question for the staff and Ms. Hughson from the Mojave
3 National Preserve.

4 Could you tell the Committee whether the preserve
5 is ready to accept relocated or translocated -- again the
6 distinction without meaning in this question -- tortoises?

7 MS. HUGHSON: This is Debra Hughson, Mojave
8 National Preserve.

9 Is this question addressed to me?

10 HEARING OFFICER KRAMER: Yes. If you are willing
11 to answer it.

12 MS. HUGHSON: We have been talking about this.
13 We have had several discussions. We have not arrived at
14 final or any agreement.

15 HEARING OFFICER KRAMER: Do you have an estimate
16 as to when you might?

17 MS. HUGHSON: No.

18 HEARING OFFICER KRAMER: Is it possible that
19 you'll be ready the accept tortoises this fall?

20 MS. HUGHSON: That's coming up fairly quickly.

21 Like I said, we have been in discussions. We
22 have had several conference calls and one meeting. We
23 have not arrived at a consensus on anything of the sort.

24 HEARING OFFICER KRAMER: Okay. Does staff have
25 anything to add to that?

1 MS. SANDERS: No.

2 HEARING OFFICER KRAMER: Okay. Thank you.

3 So now on to botany. Did you want to go last
4 or -- Mr. Harris, well, I gather you had no desert
5 tortoise witnesses besides the one we spoke to.

6 MR. HARRIS: Correct. That's correct.

7 DR. CONNOR: Mr. Kramer, this is Mike Connor.

8 Could I ask an information question? Do I need
9 to enter my testimony into evidence or is that automatic?

10 HEARING OFFICER KRAMER: No. At the end, we'll
11 discuss which exhibits come in and what status, whether
12 it's testimony or for public comment.

13 So are you about to leave us or --

14 DR. CONNOR: No. I'm fine staying around. I
15 just wanted to make sure. I didn't want to miss the
16 correct time to do it.

17 HEARING OFFICER KRAMER: No. We are not there
18 yet.

19 DR. CONNOR: Thank you.

20 HEARING OFFICER KRAMER: So, Mr. Harris, you
21 normally want to go last.

22 MR. HARRIS: It's public comment, so I'd just
23 like -- Amy Hiss is going to speak after Misa spoke. And
24 we interrupted in the flow. So thought she could provide
25 her comments now. That would be great.

1 MS. HISS: On the androstephium, I think what has
2 been said is adequate already.

3 MR. HARRIS: What about the survey?

4 MS. HISS: Just one point on Bio 18 --

5 HEARING OFFICER KRAMER: If you could identify
6 for the folks on the phone.

7 MS. HISS: I'm Amy Hiss. I'm the botanical lead
8 for the applicant.

9 And one point on Bio 18, we'd just like to
10 clarify the summer/fall survey language in the COC so that
11 we're clear exactly what that means and where it applies
12 to on site.

13 HEARING OFFICER KRAMER: Which condition were we
14 looking at? Eighteen?

15 MS. HISS: Bio 18.

16 MS. HOLMES: If you can identify specific -- are
17 you asking a question of our witness? Or are you
18 testifying? I'm very puzzled about what's going on.

19 MS. HISS: I'm making a comment, is what we would
20 call this.

21 MR. HARRIS: This is Bio 18. I guess it's three,
22 identification establishment of special status plant
23 areas, protection areas. Staff is proposing to add to
24 word "fall" in there, above "surveys," about halfway down.

25 MS. HOLMES: That's one of the changes that was

1 made last spring that was the subject of the hearing in
2 March; correct? This is not a new -- so this is not a new
3 change.

4 HEARING OFFICER KRAMER: But it's still perfectly
5 appropriate for them to ask about it.

6 MS. HOLMES: They can certainly comment on it,
7 but we had an objection to areas -- to changes that were
8 made prior to the last hearing, given that parties had an
9 opportunity to --

10 MR. HARRIS: We'll provide written comments. I
11 didn't mean to take you off task. We wanted to put Misa
12 on notice that we had concerns about the language and we
13 think it might be clarified. We'd like to talk to her
14 about that. We'll do it as comments.

15 HEARING OFFICER KRAMER: As I said earlier
16 though --

17 MS. HOLMES: If it's just simply asking a
18 question of clarification, I don't have an objection the
19 that.

20 HEARING OFFICER KRAMER: That's one of the main
21 goals of this sort of meeting being held in person is so
22 that people can have a real-time dialogue as opposed to
23 trying to correspond via basically one set of comments.

24 So go ahead, Mr. Harris.

25 MR. HARRIS: Amy, you want to elaborate on -- you

1 were talking about the level of surveys when we were
2 standing outside.

3 MS. HISS: I just wanted to clarify that we are
4 not talking about protocol level intensive surveys using
5 the 50-foot wide transect across the entire site. I want
6 to make sure we're not talking about protocol level
7 surveys.

8 We are talking about something more limited to
9 the rare plant production areas. And I want some
10 clarification on what exactly the expectation is on that
11 particular aspect of the COC. We can talk with Misa and
12 others and clarify that at a later time.

13 MR. HARRIS: If you're prepared to respond.

14 MR. SUBA: I would like it.

15 MR. HARRIS: Let have a dialogue then. That was
16 Greg's question.

17 MS. MILLIRON: That portion number three doesn't
18 specify, for example, transect width and things of that
19 nature, because that's an issue to be worked out within
20 the special status plant protection and monitoring plan
21 that's going to be developed.

22 And that plan basically lays out all of the
23 surveys that are done, not just for the special status
24 plant protection areas, but along the linears and along
25 the boundaries of the project. And that plan will go

1 through not only Commission review, but it will be -- will
2 collaborate with other agencies to assess what the
3 appropriate transect spacing would be at this point.
4 That's why it's not spelled out here, because there may be
5 certain areas that are --

6 I guess some of the things that Greg Suba brought
7 up about the rain, there may be some things -- some
8 details of that nature that may be incorporated into that
9 plan. Maybe there's some more dense areas where the
10 applicant would want to specify a different width or a
11 different areas. So those kinds of things, we really
12 don't write that type of specificity into the condition
13 itself, because when you get on the ground, you may find
14 that you need to make some changes. So that's not
15 something that we set here in the condition, but something
16 that we discuss in the compliance process in collaboration
17 with other agencies.

18 MR. HARRIS: Amy, is -- that's good enough. You
19 understand her intent, I guess?

20 MS. HISS: I just want to make sure I understand
21 that this is not something related to post-construction.
22 This is something -- post-construction, meaning that we
23 would limit this monitoring to the rare plant protection
24 areas. This is something you expect to be done prior to
25 construction?

1 MS. MILLIRON: For number three, identifying
2 established special status plant protection areas, the
3 wording is that to accurately identify boundaries of these
4 areas that are protection areas, pre-construction
5 floristic surveys shall be conducted, et cetera. So, yeah
6 pre-construction. Is that what you're asking about what
7 would be --

8 MR. DE YOUNG: That's what we heard earlier about
9 the rainfall, whether they're there this year or not.

10 MS. MILLIRON: What I was mentioning before on
11 that, if the survey team goes out and there isn't adequate
12 rainfall to capture and they're finding that the results
13 are just -- basically the surveys are pointless because
14 they're not going to detect anything new or they can't
15 really get ahold of what the vegetation fall component is,
16 then the intent of the condition is not to proceed until
17 the whole areas covered in a bad year.

18 I think that a decision can be made at this point
19 whether or not to halt the surveys until you get more
20 rain. And again, that decision would be made in the
21 compliance phase. Or I'm not sure if you're doing those
22 surveys now --

23 MR. DE YOUNG: I'll only hung up on the
24 pre-construction terminology. It may not be adequate. I
25 don't want to be held to a requirement pre-construction

1 when there's variability in there.

2 MS. MILLIRON: So maybe there is some language
3 that you guys could propose to deal with that contingency.
4 You're talking about the contingency that there isn't
5 rainfall and your surveys are inconclusive, what then?
6 That's the situation you would like more clarification on.

7 MR. DE YOUNG: Can we continue construction
8 within the facility -- as I read it, this has as a minimum
9 the mitigated Ivanpah 3 area and the other areas that are
10 set aside for protection. Not within the heliostat
11 fields, for example. And it's along the gas pipe line
12 right-of-way. I don't want to have an impact where I
13 can't begin construction of a facility because we couldn't
14 do fall surveys because the plants weren't there.

15 MS. MILLIRON: In a different area. Right

16 MR. SUBA: I want to clarify that's what I'm
17 talking about, too, and the 250-foot parameter. In those
18 areas that are where construction is not going on, in
19 future years, it may rain. And we can argue whether or
20 not -- debate whether or not it's there or not. But maybe
21 it comes up and that it's there.

22 And I'm curious as to how that -- if there is a
23 plant that comes up in those areas in the future, it's
24 there. How is that not any different than the special
25 status plants that you've already found in those areas and

1 75 percent protection and this kind of thing? Just
2 because it's not there -- this year, it hasn't rained --
3 any way. That's what I said before. Just repeating
4 myself.

5 MS. MILLIRON: I think what would be a good
6 thing, if you're going to do further comments, to
7 incorporate that, that there should be something written
8 into the mitigation plans that deals with an unanticipated
9 discovery such as that, like what that -- you know,
10 whatever measures can be done within confines of not
11 holding up a project or whatever. Some kind of language
12 that you put in there that, if infeasible, it will be
13 something that's attempted to avoid or just to deal with
14 that kind of as a contingency.

15 We do have a contingency plan, but that's more if
16 your mitigation fails to deal with that. We haven't
17 really I think addressed that in your plan. So I think
18 that's a good suggestion. That's something -- a section
19 could be added for that in the mitigation plan.

20 MR. HARRIS: Okay. Thank you. That's a
21 clarification that's very helpful. We'll think about that
22 and capture all that. Thank you.

23 We were just trying to understand your intent,
24 and that's very helpful.

25 HEARING OFFICER KRAMER: Anything else about

1 botany? On the telephone?

2 No additional questions or testimony about botany
3 or comments? Okay.

4 Couple of housekeeping items. Ms. Holmes, you
5 wanted to do -- you still want to have that March 29th
6 compilation of conditions marked as an exhibit?

7 MS. HOLMES: Yes. Staff would like to have the
8 March 29th Energy Commission staff's compilation of
9 recommended Conditions of Certification identified as
10 Exhibit 317.

11 MR. HARRIS: Sorry? March 29th?

12 MS. HOLMES: March 29th.

13 MR. HARRIS: The compilation?

14 MS. HOLMES: Yes.

15 MR. HARRIS: Thank you.

16 HEARING OFFICER KRAMER: Any objection to --
17 we'll get to the objections at the end.

18 (Thereupon, the above-referenced document
19 was marked for identification by the Hearing
20 Officer.)

21 HEARING OFFICER KRAMER: Let me get started on
22 another housekeeping item. And that's, Mr. Harris, I know
23 in the past you've been concerned about the language in
24 the conditions that in almost all cases ask that or
25 required that both -- the phrase was BLM authorized

1 officer and the CPM approved submittals are conditions.

2 And we didn't change that in the PMPD.

3 If there's a formulation that the parties have
4 agreed to or can agree to to streamline that, we're
5 certainly open to trying to achieve that. Or perhaps
6 there can be a -- those requirements are largely in the
7 verification. So we could leave that to the general
8 ability of staff to modify verifications without needing
9 to come back to the Commission. So we'd like to hear a
10 little bit of comment on that question.

11 MR. HURSHMAN: You're going to make me come to
12 the table sooner or later. The BLM --

13 HEARING OFFICER KRAMER: Please identify
14 yourself.

15 MR. HURSHMAN: This is Tom Hurshman, the BLM
16 project manager.

17 My comments on this, at this point, we are
18 working with the Energy Commission and with their
19 identified CPO to create a joint compliance monitoring
20 program such that we're not creating this duplicative
21 approval process. And I fully anticipate within the next
22 few weeks we'll get a compliance plan integrated into the
23 final plan development submitted by BrightSource for the
24 project so that we can implement a joint process together.

25 HEARING OFFICER KRAMER: So for instance, you

1 might delegate your -- whatever abilities you had under
2 our conditions to the CBO or to the CPM in the appropriate
3 case?

4 MR. HURSHMAN: That's correct.

5 HEARING OFFICER KRAMER: So it sounds then that
6 we could leave you folks to work that out among
7 yourselves. It doesn't sound as if it's necessary to
8 change the conditions. Or does somebody want to tell me
9 otherwise?

10 MR. HARRIS: I'm encouraged, Tom. Thank you.

11 I know you guys have heard us on these issues and
12 it sound like progress. And we understand and appreciate
13 BLM has the legal obligations. And so they understand our
14 concerns about duplicative review. So I don't see a need
15 to try to go wholesale change to the condition language.
16 I would appreciate the staff trying to resolve the issue.
17 So thank you.

18 MS. BELENKY: I do have a quick question. I just
19 want to make sure I understand what you said. This hasn't
20 yet been incorporated in the condition; is that correct?

21 MR. HURSHMAN: That's correct

22 MS. BELENKY: And you're proposing a condition
23 where --

24 MR. HURSHMAN: No, actually let me rephrase that.

25 In our final EIS, we describe the likelihood we

1 would be able to put together this joint process. So when
2 BLM does get to a record of decision point of view, that
3 will be described in there, and that mitigation measure
4 will be incorporated.

5 MS. BELENKY: But the conditions that may be --
6 this is for Ms. Sanders.

7 The conditions that have been proposed here, is
8 this one of the changes that you already proposed or this
9 is a change you're discussing may come later?

10 MS. SANDERS: Right now, it says I think most of
11 the conditions say report to BLM's authorized officer and
12 the CPM. And so what happens, as Tom has described with
13 there being a need to change that language, or will there
14 be a process in place of compliance to one would mean
15 compliance to both?

16 MR. HURSHMAN: Yes. You're confused I can see.

17 MS. BELENKY: I'm confused, because I don't think
18 compliance with conditions in front of the Commission is
19 the same as compliance with conditions that may be in the
20 raw. And I think under federal law that the BLM needs to
21 at least review those conditions and can't allow another
22 agency to approve at various stages. So that why I'm
23 confused.

24 MR. HURSHMAN: Under the process we're going to
25 create, BLM will enter into an agreement with BrightSource

1 as a condition of a right-of-way grants or as a grant of
2 the raw that will lay out the compliance program. BLM
3 will identify the same CBO as BLM's delegated authorized
4 officer to the extent that we can for certain things. And
5 compliance, the extra eyeballs on the ground assuring
6 compliance with appropriate provisions within our
7 right-of-way grant us something we do all the time on
8 right-of-way projects. So I don't know if that comes
9 closer.

10 MS. BELENKY: So you would be designating
11 somebody --

12 MR. HURSHMAN: We're not giving up -- we're not
13 allowing the Energy Commission to approve changes to BLM
14 right-of-way grant process or anything.

15 MS. BELENKY: That wasn't my concern. My concern
16 is that things will come up after the approval that need
17 BLM to sign off on them. If those happen, BLM will be
18 signing off on them.

19 MR. HURSHMAN: Yes, we will. Because we're going
20 to create what we refer to as a variance process. That's
21 the things we need to figure out with CDC so we don't
22 duplicate processes.

23 But from a BLM point of view, would identify any
24 variance that would need to be recognized as a change to
25 what their plan of development says which are approved by

1 BLM.

2 MS. BELENKY: Okay. Thanks.

3 HEARING OFFICER KRAMER: That doesn't sound like
4 a detail of federal law that we need to micro-manage from
5 a State agency.

6 That is the last bit of housekeeping details I
7 had.

8 Do any of the parties wish to make any additional
9 comments? And then after that we will take any public
10 comment that we might have. And then we will talk about
11 going forward.

12 MS. HOLMES: When do you want to move in our
13 exhibits?

14 HEARING OFFICER KRAMER: And then we'll talk
15 about the exhibits as well.

16 So any additional comments on any of the topics
17 or any other general comments from any of the parties?

18 Do we have any members of the public who wish to
19 make public comments? Okay.

20 Then let's go to the exhibits. I may have to
21 work a little slowly.

22 From the applicant, I just have Exhibit 90, which
23 was the FDOC Revision C, as in Charlie. That was already
24 admitted this morning by the Committee's order.

25 From the staff, we have Exhibit 316, which was

1 staff's July 30th filing with the several sub-parts
2 related to the biological conditions.

3 And then we have Exhibit 317, which was staff's
4 March 29, 2010, compilation of conditions as were agreed
5 upon as of that time.

6 And that's it from staff, isn't it?

7 MS. HOLMES: That's correct.

8 HEARING OFFICER KRAMER: This is where I'm going
9 to slow down.

10 From the Sierra Club, we have Exhibit 613
11 proposed, which is -- sorry. 613 we were going to leave
12 out because that's duplicate. But I will put it in as a
13 duplicate copy of the Gowan and Berry study. You'll see
14 it in the list, but you'll also see just for recordkeeping
15 you'll see it was not admitted, because it was a
16 duplicate.

17 614 is the Berry only progress report for 2009.
18 There's no date on it. It's approximately 60 pages. Last
19 page being blank.

20 Exhibit 615 is an e-mail from Kristen Berry to
21 Clarence Everly, subject: Tortoise health research
22 project, dated April 29, 2009.

23 Exhibit 616 is an article I gather, "Points of
24 View" -- that's the title of the -- sorry. Let me strike
25 that.

1 The article is called, "Relocation, Repatriation
2 and Translocation of Amphibians and Reptiles: Are they
3 Conservation Strategies at Work?" The authoring are
4 Kenneth Dodd and Richard Seigle. So it looks like it's in
5 the publication Perpitalogica and copyrighted and dated
6 1991.

7 Exhibit 617 is review article called,
8 "Suitability of Amphibians and Reptiles for
9 Translocation." The authors are Jennifer Germano and
10 Phillip Bishop, dated 2009 is the day of the volume.

11 Is that the extent of Sierra Club's exhibits?

12 MS. SMITH: Yes, Mr. Kramer.

13 HEARING OFFICER KRAMER: And then from Dr.
14 Connor, we have his additional testimony which was not
15 given -- it was given a number. It's 521. And that is
16 two pages updated.

17 And then we have Exhibit 522 is a February 11
18 letter to George Meckfessell of the BLM making comments on
19 the draft EIS for this project and the draft California
20 Desert Conservation Area Plan Amendment.

21 Dr. Connor, that appears also to have been
22 attached to the next exhibit; is that correct?

23 DR. CONNOR: It is. I didn't realize until I
24 mailed it in.

25 HEARING OFFICER KRAMER: Okay. So I think we can

1 just strike exhibit or leave 522 out; correct?

2 DR. CONNOR: Yeah.

3 HEARING OFFICER KRAMER: So we won't change the
4 numbering because it's all numbered and people may have
5 started to rely upon that.

6 But Exhibit 523 is a May 31st letter to Mr.
7 Meckfessell again from Dr. Connor. And it's comments on
8 the -- regarding the supplemental draft EIS for the
9 Ivanpah solar project. And it happens to contain a copy
10 or -- as an attachment of the February 1 letter --
11 February 11, 2010 letter I mentioned a moment ago.

12 And that was it from you, right Dr. Connor?

13 DR. CONNOR: That's correct.

14 HEARING OFFICER KRAMER: Okay. And then
15 Ms. Belenky, we have -- your exhibits are summarized on
16 your comments docket.

17 You have 945 is the Gowen and Berry study.
18 That's the version that we intend to use if we're going to
19 have one of them come in.

20 And Exhibit 950 was Hagerty and Tracy, a
21 follow-up report from the Scientific Advisory Committee
22 meeting, genetic structure of Mojave desert tortoise.

23 Exhibit 951 is a DRECP Independent Science
24 Advisors public review draft recommendations dated August
25 2010.

1 And 952 was the testimony of Ileene Anderson
2 regarding significant changes to the proposed project and
3 its mitigations and declarations.

4 Is that the extent of your exhibits?

5 MS. BELENKY: Yes. Thank you.

6 HEARING OFFICER KRAMER: I think that just leaves
7 Mr. Suba.

8 MR. SUBA: All references in my testimony are
9 exhibits that I have already submitted.

10 HEARING OFFICER KRAMER: Are you suggesting we
11 can just treat yours as comment or argument?

12 MR. SUBA: Well, if you're asking me this
13 question you asked me before whether it should be comment
14 or testimony, I'll give you the same answer. It's
15 testimony without any additional exhibits.

16 HEARING OFFICER KRAMER: Okay. So then that
17 would be exhibit --

18 MR. SUBA: 1,014, I think.

19 HEARING OFFICER KRAMER: Nope. That one is
20 taken. It was this would be Exhibit 1016. Did I miss
21 anyone?

22 MR. HARRIS: Mr. Kramer, there's another exhibit
23 that was referred to by staff, which was a memorandum that
24 talked about the misidentification of the flower that
25 Caryn likes to say the name of and I can't say it --

1 androstephium.

2 MS. HOLMES: Androstephium.

3 MR. HARRIS: Thank you. And Mesa mentioned that
4 memorandum. We probably should get that into the record
5 as well.

6 HEARING OFFICER KRAMER: Do you have a copy of
7 that?

8 MS. HOLMES: I believe we do.

9 MS. SANDERS: That's one of our attachments.

10 MR. HARRIS: Is it an attachment to your staff --

11 MS. SANDERS: Yes.

12 MR. HARRIS: It will be an attachment to what you
13 file.

14 MS. SANDERS: Right. It's going to be an
15 attachment.

16 MS. HOLMES: I think he wants a number now.

17 MR. HARRIS: We have 20 copies, but there is a
18 typo in it. I can hand correct those and resend the
19 corrected version.

20 HEARING OFFICER KRAMER: So you're providing
21 their exhibit?

22 MS. HOLMES: It's actually their exhibit. They
23 had indicated to us they had misidentified the plant. And
24 to we relied on that. And I just suggested to Mr. Harris
25 it would be useful to close the loop on this and make sure

1 the memo is in the record. But that's not our memo.

2 MR. HARRIS: It's a memo from CH2M HILL to file
3 here.

4 HEARING OFFICER KRAMER: Why don't we make that
5 Mr. Harris' Number 91.

6 MR. HARRIS: We'll serve that electronically as
7 we speak here. I have it now.

8 HEARING OFFICER KRAMER: Just ever so brief
9 description of it for my notes.

10 MR. HARRIS: Memorandum prepared by Amy Hiss to
11 John Carrier. It's dated --

12 MS. HISS: August 24th, today.

13 MR. HARRIS: Revised date of August 24th. And
14 the subject is the misidentification of the flower Caryn
15 likes to say.

16 MS. HOLMES: New Latin name.

17 MR. HARRIS: Jesuit taught you better than me.

18 HEARING OFFICER KRAMER: Okay. So we have
19 Exhibit 91. Any objections to receiving that? That's
20 admitted today.

21 (Thereupon, the above referenced document
22 was admitted by the Hearing Officer.)

23 HEARING OFFICER KRAMER: We have staff's Exhibits
24 316 and 17. Any objections to receiving those? Seeing
25 none, those are received today.

1 (Thereupon the above-referenced document
2 was admitted into evidence by the Hearing
3 Officer.)

4 HEARING OFFICER KRAMER: We have the Sierra
5 Club's Exhibits 613 is not going to be received because it
6 was a duplicate.

7 We have 614 through 617.

8 MS. SMITH: Through 617, yes.

9 HEARING OFFICER KRAMER: Any objection?

10 MR. HARRIS: Those the ones that were not part of
11 the FOIA request. I believe they're prior documents. We
12 accept those as public comment.

13 MS. SMITH: Mr. Kramer, from my experience here,
14 the Committee has always encouraged full disclosure and as
15 much information in the record as possible.

16 Again, this has been somewhat of a moving target.
17 In light of all the information, we've done additional
18 research. There's no question these are not part of the
19 FOIA request. We've been working hard to learn as much as
20 possible about this issue. So that's why we are offering
21 some additional studies at this time.

22 MR. HARRIS: We have no objection to these coming
23 in as public comment.

24 HEARING OFFICER KRAMER: The 614, which is follow
25 up -- well I'm not sure the relationship to the other

1 document, but it's another progress report on tortoises
2 for 2009 from Dr. Berry. Am I correct that that came with
3 the FOIA request?

4 MS. SMITH: Correct.

5 HEARING OFFICER KRAMER: So that 614 will be in
6 as testimony.

7 (Thereupon the above-referenced document
8 was admitted into evidence by the Hearing
9 Officer.)

10 HEARING OFFICER KRAMER: And the remainders
11 are -- these are just journal articles and perhaps they've
12 informed the expert testimony which has come in as
13 testimony, but by themselves without the ability to
14 cross-examine the authors given the timing issues, we will
15 simply bring those in as comment.

16 MS. SMITH: It's an odd standard since we haven't
17 been bringing any of the authors of the studies in to
18 cross-examine. We've talked about bringing Dr. Berry, in
19 and hopefully that will happen. But she hasn't been
20 offered yet.

21 HEARING OFFICER KRAMER: Tomorrow. Actually.
22 She couldn't come today.

23 MS. SMITH: That's excellent.

24 HEARING OFFICER KRAMER: But not on this case.
25 Well, we can bring them in to the extent they explain the

1 expert opinions that are based upon them, but not for the
2 truth of the matters they're asserting that we haven't
3 received specific testimony about.

4 MS. SMITH: As foundational supportive
5 information on the merits of translocation I think that's
6 acceptable.

7 HEARING OFFICER KRAMER: So 614 is evidence.

8 615 to 617 are foundation for expert opinion. Is
9 there any comments?

10 MR. HARRIS: I'm happy if Gloria is happy.

11 MS. SMITH: That's fine.

12 HEARING OFFICER KRAMER: Okay. Any objection to
13 receiving those on that basis? Seeing none, those are
14 admitted, as I just explained today.

15 (Thereupon the above-referenced document
16 was admitted into evidence by the Hearing
17 Officer.)

18 MS. HOLMES: Hearing Officer Kramer, can you
19 explain what you mean by the difference between evidence
20 and foundation? I'm thinking of our rules of evidence and
21 I'm having a little bit of trouble.

22 HEARING OFFICER KRAMER: I think what I'm doing
23 is telling you how the Committee's -- how much weight the
24 Committee is giving.

25 MS. HOLMES: Things are in the record, and you

1 are giving a preview of the amount of weight that you
2 might give to something? Because Ms. Smith is absolutely
3 correct that all parties have put in exhibits and they've
4 been introduced into the record without providing the
5 authors. And I think that we, in most cases, explained
6 how we relied upon them. If what you are doing is just
7 confirming that that's been the practice of the
8 Commission, I understand what your ruling is.

9 HEARING OFFICER KRAMER: And to be fair, some of
10 these documents are really thick, and they were provided
11 just the other day. So it would be unfair for somebody to
12 try to pull a chestnut, if you will, out of one of the
13 footnotes of these documents and their briefs with, at
14 this point, no notice or opportunity to really respond for
15 the other parties.

16 MS. HOLMES: It would be fair to say the amount
17 of weight you give them depends upon the length of time
18 the party provided for review before they suggested them
19 or moved them into evidence?

20 HEARING OFFICER KRAMER: That's not -- that's can
21 be an element.

22 MS. HOLMES: I'm just trying to understand.

23 MR. HARRIS: One of the things you said is really
24 important. You said -- and provided testimony explaining
25 how you used those documents. And in this case, the

1 written testimony is just a list of the documents. There
2 was oral testimony --

3 MS. HOLMES: I understand. I just want to make
4 sure that our record is tidy. That's all.

5 MR. HARRIS: You and me both, thank you.

6 HEARING OFFICER KRAMER: It's certainly full.

7 Exhibit 521, Dr. Connor's testimony, and which
8 was two pages, and then Exhibit 523, his comment letter to
9 the BLM draft and supplemental.

10 Any objection to receiving those?

11 Dr. Connor, I just pulled up the list here and
12 we'll stick with your numbers, but was there an Exhibit
13 520 that you're aware of? Because there is none on the
14 exhibit list right now.

15 DR. CONNOR: I thought there was.

16 HEARING OFFICER KRAMER: Well, if you think there
17 was one, inform us in your comments. Because the exhibit
18 list is missing it.

19 DR. CONNOR: Okay.

20 HEARING OFFICER KRAMER: Hearing no objections,
21 Exhibits 521 and 523 are accepted into evidence today.

22 (Thereupon the above-referenced document
23 was admitted into evidence by the Hearing
24 Officer.)

25 HEARING OFFICER KRAMER: Center for Biological

1 Diversity, 949, 950, 951, 952, any objections to receiving
2 those?

3 MR. HARRIS: Give me a moment, please.

4 952 is Ms. Anderson's file?

5 HEARING OFFICER KRAMER: Her testimony, yes.

6 MR. HARRIS: The other ones though are documents
7 to rely upon those in her written testimony?

8 MS. BELENKY: Yes.

9 HEARING OFFICER KRAMER: And 949 is that Gowan
10 and Berry study that we certainly discussed quite a bit.
11 And it was of great interest to the Committee, having
12 heard about it in other places.

13 Ms. Belenky while he's thinking, it looks like
14 we're missing a 948.

15 MS. BELENKY: You know, there was -- the last
16 exhibit list I could find had a 948 on it. But it was not
17 described and I couldn't figure out what it was. So we
18 might have skipped one number.

19 HEARING OFFICER KRAMER: Doesn't sound like
20 you'll miss it.

21 MS. BELENKY: I wasn't sure. I'll double-check.

22 HEARING OFFICER KRAMER: If you decide you're
23 missing it, actually give me a call and we'll try to
24 figure out what happened if you decide you're missing it.

25 MS. BELENKY: Okay.

1 HEARING OFFICER KRAMER: Mr. Harris?

2 MR. HARRIS: My quick word search confirms she
3 does reference all those in her testimony. So that's what
4 she relied on in preparing testimony.

5 HEARING OFFICER KRAMER: 949 to 952, any
6 objections? Seeing none, those are admitted today.

7 (Thereupon the above-referenced document
8 was admitted into evidence by the Hearing
9 Officer.)

10 HEARING OFFICER KRAMER: Finally, Mr. Suba, I
11 believe Exhibit 1016, which was his additional testimony.

12 Mr. Harris, are you renewing your objection to it
13 coming in as anything more than public comment?

14 MR. HARRIS: Yeah. I think this so. This looks
15 like argument to me. Yes, I renew that.

16 HEARING OFFICER KRAMER: And any other comments
17 from the other parties? We agree that it does sound like
18 argument. And so we will of had -- having been marked and
19 discussed, we will mark it, but it will come in as
20 argument and public comment rather than as testimony.

21 MR. SUBA: Does it still have an exhibit number?

22 HEARING OFFICER KRAMER: Yes. 1016.

23 (Thereupon the above-referenced document
24 was admitted into evidence by the Hearing
25 Officer.)

1 HEARING OFFICER KRAMER: I think that exhausts
2 all the exhibits.

3 MS. HOLMES: Not quite. First of all, I guess I
4 would ask if the Committee would take official notice of
5 the following Environmental Impact Statement.

6 HEARING OFFICER KRAMER: We certainly can
7 entertain that.

8 Any objections?

9 MR. HARRIS: That's fine document. Thank you.

10 MS. HOLMES: Finally, in preparing its changes to
11 the Conditions of Certification, which we had hoped to
12 file by today but did not, we had relied on three
13 additional documents. One is the draft biological
14 opinion. Another is the translocation guidance from U.S.
15 Fish and Wildlife Service. And another is a document I'll
16 have to ask Ms. Sanders, because I don't know what it is.
17 Something about preparing for any action within the range
18 of the Mojave desert tortoise.

19 And now I understand there's the document that we
20 referred to with respect to how the raven fee was
21 developed. Looks like there were two raven fee documents.

22 I'll let Ms. Sanders summarize them and then the
23 Committee can decide since they're federal documents -- I
24 guess it would be a question whether we want official
25 notice or her to explain how she relied on them in her

1 testimony. I don't think it matters.

2 Susan, would you mind explaining what those
3 documents are?

4 MS. SANDERS: The document that you just went
5 through?

6 MS. HOLMES: Right.

7 MS. SANDERS: Okay. They include the draft
8 biological opinion, which was out in April 2010, which we
9 talked about quite a bit today and Mr. Croft also
10 discussed.

11 HEARING OFFICER KRAMER: Do you have a day of the
12 month for that too?

13 MS. SANDERS: I do. Remember, it's the wrong
14 year. April 26th, 2009. But it should be April 26th,
15 2010. It says 26 on the memorandum random.

16 The preparing for any action that may occur
17 within the range of the Mojave desert tortoise 2010 field
18 season, US Fish and Wildlife Service, that's the protocol
19 for doing surveys the new updated protocol. That's on the
20 website. The Ventura Fish and Wildlife Office website is
21 what's currently used now.

22 HEARING OFFICER KRAMER: This is the next
23 document?

24 MS. SANDERS: Yes.

25 HEARING OFFICER KRAMER: I'll get the exact title

1 from you after.

2 Next.

3 MS. SANDERS: The U.S. Fish and Wildlife Service
4 Environmental Assessment to Implement a Desert Tortoise
5 Recovery Plan Task: Reduce Common Raven Predation on the
6 Desert Tortoise. And the date on that I can't remember,
7 but I think it's 2009.

8 Then there's two of the documents we're just
9 going to combine and submit as one. These last few that I
10 mentioned are in support of the raven fee. One of them is
11 called U.S. Fish and Wildlife Service Renewable Energy
12 Development and Common Raven Predation on the Desert
13 Tortoise summary, dated May 2010.

14 And then a second document: Cost Allocation
15 Methodology for Implementation of the Regional Raven
16 Management Plan, July 9th, 2010.

17 MS. HOLMES: Since these are all government
18 publications, they are appropriate, I prefer official
19 notice. Or I think Ms. Sanders has explained how she
20 relied on them in her testimony. So that may be yet
21 another distinction without a difference. So if we could
22 have those marked as exhibit and entered I think that
23 would be appropriate.

24 HEARING OFFICER KRAMER: The last two were
25 combined?

1 MS. HOLMES: Yes.

2 MR. HARRIS: These are documents we are going to
3 take official notice of, Caryn; is that right?

4 MS. HOLMES: The Commission can and the Committee
5 has the ability of take official notice of them. I agree.

6 MS. BELENKY: I'm sorry. I didn't think he asked
7 for objections yet.

8 MR. HARRIS: I was asking for clarification.
9 Sorry. I'm not objecting. I just wanted to make sure how
10 they were coming in.

11 I have another question about official notice. I
12 mean, is it the Committee's position that if a document
13 isn't listed for a official notice right here you can't
14 site the comments on the PMPD?

15 MS. HOLMES: I'm trying to be cautious. I'm
16 trying to Ensure that to the extent the Commission or any
17 other party wants to rely on the document, We've gone
18 through the formal steps to make sure it's part of the
19 record.

20 MR. HARRIS: We have no objection to taking
21 official notice. But if the staff can e-mail copies --

22 MS. HOLMES: The documents themselves are the
23 URLs where they can be found. They're voluminous.

24 MR. HARRIS: All the other reason to take
25 official notice than make them exhibits.

1 MS. BELENKY: Did you ask for objections? I
2 don't want this to go further without my getting to
3 discuss --

4 HEARING OFFICER KRAMER: Now is the time for
5 objections.

6 MS. BELENKY: We don't object to most of those.
7 However, the draft biological opinion was not provided to
8 all the parties in this matter. And to the extent that
9 you relied on it in your testimony, we still had never
10 seen it, and we still haven't seen it.

11 So to the extent that you want to submit that
12 into the record, we would like to have an opportunity to
13 look at it and to rebut statements that you've made and
14 reliance on.

15 HEARING OFFICER KRAMER: Well, we're not planning
16 on having any more testimony.

17 MS. BELENKY: Then they should have provided it
18 before the evidentiary hearing. The draft is not
19 available to the public. This is not an officially
20 noticeable document. And it is not publicly available.
21 The other documents we have no problem with. They are
22 probably available and, in fact, we're pretty well aware
23 of most of them.

24 HEARING OFFICER KRAMER: Well, it's not clear to
25 me it undermines the testimony.

1 MS. SANDERS: I think it's fine. I just wanted
2 to provide as much information as possible to the
3 Committee.

4 I think one of the main reasons I put it in there
5 was because it gave you insight as to what kind of
6 measures the Fish and Wildlife Service was taking to
7 protect desert tortoise in the process of translocation.
8 It provided an updated estimate using this new methodology
9 as to what the densities were at the Ivanpah site.

10 So that was all useful information. But there's
11 nothing in my testimony that is indispensable, anything
12 I've said today. So I think we're fine with that if you
13 object to it, at least from my perspective.

14 MS. BELENKY: I think it would be provided as
15 public comment then as you were saying. I mean, this is a
16 document that we -- it is a draft document. It was not
17 publicly available. It has not been provided to the
18 parties.

19 MS. HOLMES: We're withdrawing to have it
20 identified as an exhibit.

21 HEARING OFFICER KRAMER: Okay. So then the draft
22 is off the list.

23 So we have the four other items. As I recall,
24 what we did at the end of the one of the last hearings was
25 the applicant circulated a list of documents that were

1 proposed for official notice with the links. So if staff
2 could do that with a more precise description, but we will
3 take -- are there any other objections to comment?

4 DR. CONNOR: Mr. Kramer, Michael Connor.

5 As far as the 2010 protocol document is
6 concerned, Fish and Wildlife Service replaced that on an
7 annual basis. So may be more appropriate to actually
8 e-mail it to the parties. I don't think it's that large a
9 file.

10 MS. SANDERS: It's not.

11 HEARING OFFICER KRAMER: They'll produce that one
12 as a -- circulate that directly rather than a link. And
13 if staff could give just the Committee one printed copy of
14 them so we -- to avoid that kind of problem, then we'll
15 have one in the box in case we can no longer find it
16 electronically.

17 MS. HOLMES: We'll do that.

18 HEARING OFFICER KRAMER: We will take official
19 notice of those four documents.

20 We did forget -- no, we already brought in
21 Exhibit 1100. That's the Hoffman report. That was
22 brought in as public comment this morning. So we're
23 covered on that.

24 So as far as I can tell, I think that's all the
25 exhibits we need to discuss.

1 Did I miss anything?

2 Seeing or hearing none, any final thoughts from
3 the parties?

4 When the comment period ends, we'll start
5 considering the comments you provided. When the comment
6 period does end, we will review all the comments and
7 decide the proper forum to respond to them. And it may
8 take the form of -- could be as simple as a more than one
9 page errata to the PMPD or it may require a little more
10 than that. But until we see the comments, we cannot say
11 for sure.

12 The current notice has the hearing of the
13 business meeting on September 15th. And unless there is a
14 reason to change that, we'll assuming that will be the
15 day. And you will receive the revised document at some
16 point prior to that. If we do need to change it, then
17 there will be another notice. But to predict exactly what
18 will need to happen at this point will be speculation and
19 not helpful.

20 So are there any other final issues that parties
21 wish to raise?

22 MR. HARRIS: Just want to understand we have for
23 the parties the next event is the September 2nd comments
24 on the PMPD.

25 HEARING OFFICER KRAMER: Right.

1 MR. HARRIS: That's the last thing we'll be
2 filing as a group, and then PMPD thereafter.

3 HEARING OFFICER KRAMER: Yes. And if you have
4 proposed changes to conditions, like I said earlier, we
5 were hoping that we could have a dialogue and resolve
6 comments on those proposals.

7 But if you could circulate them earlier than the
8 final day so that the others would have a chance to
9 address them in their final comments, that might provide
10 us with a little bit better discussion to help us resolve
11 any remaining conflicts in the proposals.

12 And I gather staff already doing that very
13 shortly with theirs, which probably will be the bulk of
14 the proposals.

15 So any final comments?

16 MR. HARRIS: Just from the applicant, we want to
17 hold the 15th date. We are going to start moving desert
18 tortoise hopefully November 15th -- September. I'm sorry.
19 By want to hold the September 15th date, and we'll do
20 whatever we can to make that happen. We've got processes
21 underway right now that allow us to move desert tortoise
22 this fall. And that date is very important to us. So
23 thank you.

24 HEARING OFFICER KRAMER: Thank you all.

25 Commission Byron.

1 COMMISSIONER BYRON: Mr. Boyd, did you want to
2 say anything before we break?

3 COMMISSIONER BOYD: Thank everybody for this.
4 It's been actually quite helpful to me. And in the face
5 of all the other stuff we're doing, I imagine it's hard to
6 keep it sorted out one from the other.

7 COMMISSIONER BYRON: In fact, I'd like to thank
8 you for your participation today. We all have rather
9 substantial case loads. There's just not enough waking
10 hours in the day right now.

11 But thank all the parties certainly for your
12 professionalism, your speed, and your patience which was
13 taxed to some extent today. And I appreciate that.

14 We are looking forward getting all public
15 comments and your comments by September 2nd, 2010. And as
16 was stated earlier, the plan is to move this towards a
17 September 15th full Commission hearing.

18 Thank you for being here today. We'll be
19 adjourned.

20 (Thereupon the Commission adjourned at 5:05 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, TIFFANY C. KRAFT, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing hearing was reported in shorthand by me,
7 Tiffany C. Kraft, a Certified Shorthand Reporter of the
8 State of California, and thereafter transcribed into
9 typewriting.

10 I further certify that I am not of counsel or
11 attorney for any of the parties to said hearing nor in any
12 way interested in the outcome of said hearing.

13 IN WITNESS WHEREOF, I have hereunto set my hand
14 this 27th day of August, 2010.

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